Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-2067

THE METROPOLITAN SCHOOL DISTRICTS OF LAWRENCE, WARREN AND WAYNE TOWNSHIPS, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF DECATUR TOWNSHIP, MARION COUNTY, INDIANA, THE FRANKLIN TOWNSHIP COMMUNITY SCHOOL CORPORATION, MARION COUNTY, INDIANA,

Petitioners,

vs.

DONNY BRURELL BUCKLEY AND ALYCIA MARQUESE BUCKLEY, BY THEIR PARENT AND NEXT FRIEND, RUBY L. BUCKLEY, ON BEHALF OF THEMSELVES AND ALL NEGRO SCHOOL AGE CHILDREN RESIDING IN THE AREA SERVED BY THE ORIGINAL DEFENDANTS; UNITED STATES OF AMERICA; THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on April 29, 1980, in this case.[1]

QUESTIONS PRESENTED

1. (a) Did the Court of Appeals, Judge Tone dissenting, correctly conclude that the 1969 Indiana General Assembly in reorganizing the splintered and overlapping units of civil government in Indianapolis and Marion County had an affirmative Fourteenth Amendment duty, as defined in *Milliken* v. *Bradley*, 418 U. S. 717 (1974), to black students attending the Indianapolis Public School district to remedy *de facto* racial differences between that school district and the other school districts in Marion County, even though all Indiana school corporations are organized and operated as separate governmental entities independent of both local civil government and each other and the legislation effected no school boundary change?

(b) In determining that the General Assembly acted with a discriminatory racial purpose in adopting its 1969 legislation, did the Court of Appeals, Judge Tone dissenting, fail to follow *Washington* v. *Davis*, 426 U. S. 229 (1976) and *Village of*

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1. Parties to the proceeding in the United States Court of Appeals not listed in the caption are: The Metropolitan School District of Perry Township, Marion County, Indiana; The Metropolitan School District of Pike Township, Marion County, Indiana; The Metropolitan School District of Washington Township, Marion County, Indiana; School City of Beech Grove, Marion County, Indiana; School Town of Speedway, Marion County, Indiana; The Housing Authority of the City of Indianapolis, Indiana; The Metropolitan Development Commission of Marion County, Indiana; Otis R. Bowen, as Governor of the State of Indiana; Theodore L. Sendak, as Attorney General of the State of Indiana; Harold H. Negley, as Superintendent of Public Instruction of the State of Indiana; The Indiana State Board of Education, a public corporate body; and The Indiana State Teachers Association.

Arlington Heights v. *Metropolitan Development Corporation,* 429 U. S. 252 (1977), by finding a purported change in a legislative policy requiring coterminous Indianapolis school and civil boundaries, even though that policy was substantially abandoned or limited by 1959 and 1961 legislation mandating establishment of school boundaries on considerations of financial and administrative efficiency, and Marion County school boundaries were established on that basis since 1961 and by 1969 were no longer coterminous with civil boundaries?

2. (a) Is the Court of Appeals majority opinion, Judge Tone dissenting, correct in determining that a purported Fourteenth Amendment violation by the Housing Authority of the City of Indianapolis—*i.e.*, placing its units of public housing within the more demographically black Indianapolis than in the surrounding suburban areas in Marion County—must be cured by transferring students across school district lines rather than by an affirmative housing remedy against HACI?

(b) Does it make any difference in establishing discriminatory intent or a significant interdistrict segregative effect in the location of public housing that it was located in both black and white demographic areas and did not increase the number of black students in the Indianapolis public school district, or under *Personnel Administrator of Massachusetts* v. *Feeney,* ..... U. S. ....., 60 L. Ed. 870, 888 n. 25 (1979) and *James* v. *Valtierra,* 402 U S. 137 (1971), that the Housing Authority had no ability under Federal law to locate public housing in the other districts because Marion County civil government officials with jurisdiction over the suburban areas outside Indianapolis were unwilling or unable to enter into the cooperation agreements necessary to Federal financing?

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OPINIONS BELOW

The opinions below on which this appeal is based are in chronological order, as follows:

Opinion of the United States District Court for the Southern District of Indiana ("District Court"), dated August 1, 1975. (419 F. Supp. 180; SA 36)[2]

Majority and dissenting opinions of the United States Court of Appeals for the Seventh Circuit ("Court of Appeals"), dated July 16, 1976, affirming the District Court, which were appealed to this Court or subject to petitions for certiorari and were remanded by this Court, 429 U. S. 1068 (1977). (541 F. 2d 1211; SA 1)

Principal, concurring and dissenting opinions of the Court of Appeals, dated February 14, 1978, remanding the case to the District Court. (573 F. 2d 400; JA 54-83)

Opinion of the District Court on remand, dated July 11, 1978 (456 F. Supp. 183; JA 84-100).

Opinion of the District Court on additional limited remand related to remedy, dated April 24, 1979, as yet unreported. (JA 101-129)

Majority and dissenting opinions of the Court of Appeals, dated April 29, 1980, as yet unreported, which are the subject of this appeal. (JA 1-53)

JURISDICTION

The judgment and opinion of the Court of Appeals sought to be reviewed by this petition were dated and entered April 29, 1980. No petition for rehearing was filed. The jurisdiction of this Court in invoked under 28 U. S. C. § 1254(1).

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2. Petitioners hereby adopt the separately bound Joint Appendix, previously filed in this Court with petitions for certiorari to the United States Court of Appeals for the Seventh Circuit from the same judgment entered April 29, 1980, by The Metropolitan School District of Perry Township, Marion County, Indiana, and Otis R. Bowen, Governor of Indiana, and other State officials. A separately bound Supplemental Appendix is filed with this petition. These appendices will be cited as "JA" and "SA", respectively.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

This case involves the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, which reads as follows:

> Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The statutes of the State of Indiana involved in the Court of Appeals holding that the failure to expand the boundaries of the Indianapolis Public Schools in 1969 was a constitutional violation warranting an interdistrict school desegregation remedy are: Acts 1961, Ch. 186 (JA 138-151), Marion County School Annexation Act, Acts 1969, Ch. 52, School Annexation Amendment (JA 151-153), and Acts 1969, Ch. 173, Marion County Civil Government Reorganization Act often referred to as "Uni-Gov" (JA 154-167).

The statutes involved in showing the existing legislative policy as respects school and civil boundaries are: Acts 1959, Ch. 202, School Corporation Reorganization Act, (SA 63), Acts 1961, Ch. 186, Marion County School Annexation Act, *supra.* The statutes involved indicating the impediments to civil boundary change prior to and after 1969 are: Acts 1905, Ch. 129, as amended by Acts 1955, Ch. 269 (SA 55), and Acts 1969, Ch. 239 (SA 47).

The statutes involved in the Court of Appeals holding that the locating of all public housing projects within the area served by the Indianapolis Public Schools was a constitutional violation warranting an interdistrict school desegregation remedy are: Indiana Acts 1937, Ch. 207, pp. 1034-1055 (Housing Authority Act), as amended by Indiana Acts 1965, Ch. 384, pp. 1185-

1192 (JA 168); Indiana Acts 1937, Ch. 209, pp. 1058-1063 (Housing Cooperation Act) (JA 168-169); and the United States Housing Act of 1937, as amended, 42 U. S. C. § 1415 (JA 169-170).

The statutes cited above are set out in pertinent part in the Joint Appendix or the Supplemental Appendix at the pages indicated.[3]

STATEMENT OF THE CASE

First Two Hearings

The United States commenced this action in the United States District Court for the Southern District of Indiana, in May, 1968, under §§ 407(a) and (b) of the Civil Rights Act of 1964, 42 U. S. C. §§ 2000c-6(a) and (b), against The Board of School Commissioners of the City of Indianapolis, Indiana (IPS), an independent governmental entity as the only defendant. The "sole issue" was racial segregation within the IPS schools, and after hearing, the District Court entered an order in 1971, finding that IPS was ". . . operating a segregated school system wherein segregation was imposed and enforced by operation of law, . . ." (332 F. Sup. 655, at 677-78). This judgment was affirmed by the Court of Appeals for the Seventh Circuit (474 F. 2d 81 (1974)); certiorari was denied (413 U. S. 920 (1974)).

In its 1971 opinion, the District Court postulated a theme relating to remedy which recurs in and is the heart of each of its subsequent orders. It notes its undoubted authority to order a "massive fruit basket scrambling" of IPS students which it re-

3. Through 1969, Indiana session laws are printed and cited by the year adopted as a "chapter". Permanent statutes were codified as of the beginning of Indiana's 1971 legislative session as "Indiana Code, 1971". The 1971 Code, as amended through 1975, was readopted in 1976 as a restatement of Indiana law entitled "Indiana Code" and cited "IC .....". Session laws are set out in both Appendices to reflect the applicable wording in 1969 and prior years.

fused to impose because "in the long haul it won't work," as required of any remedy in *Green* v. *Board of Education of New Kent County,* 391 U. S. 430 (1968), and would cause "white flight" and resegregation.[4] The District Court, however, evinced an interest in using Uni-Gov (Acts 1969, Ch. 173; JA 154), the 1969 civil government reform in Marion County, to avoid these problems, noting that if the IPS Board's jurisdiction were coterminous with that of Uni-Gov, the resegregation problem would "pale into insignificance" and would be minimized still further if extended to Beech Grove, Speedway City located in Marion County, and parts of certain adjoining counties (332 F. Supp. at 679).

The Court then ordered the United States to add as defendants other school districts in the metropolitan area, including all the petitioners herein, for consideration of the appropriateness of the metropolitan remedy. The United States complied without, however, filing any complaint against the added school defendants. The Buckley Plaintiffs, representing a class of black students, were granted permission to intervene, joining as additional defendants several State officials and certain additional school districts, filing a complaint against all defendants challenging the constitutionality of Uni-Gov, the 1961 School Annexation statute (Acts 1961, Ch. 186, JA 138) and its 1969 amendment (Acts 1969, Ch. 52, JA 151).

In 1973, the District Court held a second hearing with all the additional parties on the issues suggested for later determination in its own 1971 order and the intervening complaint. The District Court in its opinions, however, never reached the questions of constitutionality but concentrated primarily on the questions of remedy (368 F. Supp. 1191 (1973)). It found (1) that a meaningful, permanent desegregation plan for IPS could not be accomplished within its boundaries based on evidence that

4. 332 F. Supp. at 676, 678 (1971); 368 F. Supp. at 1197, 1205 (1973), 419 F. Supp. 180, 184 (1975); 456 F. Supp. 183, 191 (1978); SA 42.

"white flight," resulting in resegregation, accelerates when any given school approaches 25%-30% black (*Id.* at 1198-99), and (2) that the State of Indiana and its officials promoted segregation *within IPS* principally by their approval of school sites and, accordingly, had an affirmative duty to desegregate IPS (*Id.* at 1202). The District Court ordered an interim intra-district plan within IPS making all elementary schools no less than 15% black (*Id.* at 1223-24) and, following the reasoning of the Court of Appeals opinion in the Sixth Circuit in *Bradley* v. *Milliken,* 484 F. 2d 215 (1973), reversed in 418 U. S. 717 (1974), ordered a broad interim remedy transferring IPS black students to surrounding school corporations in numbers necessary to increase their black enrollment to 5%, and suggested choices to the Indiana General Assembly for alternative inter-district remedies (*Id.* at 1208-09, 1228 *et seq.*).

The District Court's 1973 opinion was appealed, and on August 21, 1974, the Court of Appeals entered its decision affirming the judgment against the State for contributing to segregation *within IPS,* reversed the District Court's findings as they pertained to a metropolitan remedy beyond the "Uni-Gov boundaries" and remanded the case to the District Court for further hearing as t the remaining defendants, stating:

> The District Court should determine whether the establishment of the Uni-Gov boundaries without a like reestablishment of IPS boundaries warrants an interdistrict remedy within Uni-Gov in accordance with *Milliken.* 503 F. 2d at 86.

A petition for certiorari with respect to this opinion was denied (421 U. S. 929 (1974)).

Summary of Subsequent Proceedings

The subsequent proceedings commenced with the 1975 remand hearing and opinion by the District Court and were based (1) on the effect of Uni-Gov, as required by the Court of Appeals mandate, and (2) for the first time on whether there

was a constitutional violation by The Housing Authority of the City of Indianapolis (HACI) in locating all its housing projects in the period prior to 1970 within the boundaries of the City of Indianapolis prior to Uni-Gov, which were substantially the IPS boundaries. The District Court found a segregative interdistrict effect for both violations but made no specific finding that the siting of public housing constituted an interdistrict school violation, nor was this issue addressed by the subsequent Court of Appeals determination.[5] The 1975 hearing and opinion culminated in a District Court judgment that each Marion County school corporation outside IPS enroll black IPS students equal to 15% of its enrollment, excepting, however, Pike and Washington,[6] whose percentages of black students had been continuously increasing, and that HACI was enjoined from locating any further housing projects within the boundaries of IPS (419 F. Supp. 180; SA 36).

This opinion was affirmed by the Court of Appeals in an opinion to which Judge Tone dissented in 541 F. 2d 1121 (1976) (SA 1). On appeals and petitions for certiorari, this Court vacated and remanded the Court of Appeals judgment for further consideration in the light of *Washington* v. *Davis,* 426 U. S. 229 (1976), and *Village of Arlington Heights* v. *Metropolitan Development Corporation,* 429 U. S. 252 (1977).

Following this remand, the Court of Appeals rendered three opinions—a principal opinion by Judge Swygert in parts I and II of which Judge Fairchild concurred, and a dissenting opinion by Judge Tone (573 F. 2d 400; JA 54-83). The plurality determined that discriminatory intent, the issue on remand, could not be determined as a matter of law from the existing record and ordered the case remanded for further consideration of intent

5. In the judgments subsequent to this Court's remand in 1976, both "violations" are found to require an interdistrict school remedy.

6. Reference to the Marion County township school corporations and city or town school corporations other than IPS will be by their distinguishing name, *e.g.* "Lawrence" or "Speedway".

by the District Court (573 F. 2d 414 (1978); JA 79). The plurality portions of Judge Swygert's opinion (*e.g.*, JA 61) rely on certain findings in his pre-remand and vacated 1976 opinion, which are also relied on by the Court of Appeals majority opinion here in issue (JA 2, 7).

On the basis of the 1975 record, without hearing further evidence, the District Court then found the requisite discriminatory intent and reinstated its 1975 judgments (456 F. Supp. 183 (1978); JA 84). By a subsequent remand order, the Court of Appeals directed the District Court to hold a hearing on remedy. This hearing, held in 1978, also involved findings of fact, relevant to the question of violation, set out in an unreported opinion (JA 101 *et seq.*)[7]

By this 1979 opinion and accompanying judgment, the District Court reaffirmed its 1978 opinion, modified only to decrease the number of IPS black students transferred to Lawrence because of its rapidly increasing black enrollment, and to require certain ancillary actions by the defendants relating to such matters as "in-service" training.

On appeal, this judgment was affirmed by the Court of Appeals, by a majority opinion and order with a dissenting opinion by Judge Tone, both as yet unreported, dated April 29, 1980, to which this petition relates. An analysis of the majority Court of Appeals opinion described above depends on the pertinent facts found by the District Court and the Court of Appeals. A statement of these facts follows.

Statement of Facts

Demographics of Marion County. Marion County and the metropolitan area surrounding it is similar to many other metropolitan areas in the United States. It has a central city core with more black citizens and students than the surrounding areas which vary in black/white ratio but are predominantly

7. For a determination as to the relevance of these findings on violation, see Maj. Op. JA 17, n. 20.

white (Maj. Op., JA 6). In the school year 1968-69, 36% of IPS students were black, a percentage which has increased gradually to over 47% in the 1978-79 school year (IPS Ex. 64). The black population and students are not located in the center of Marion County or IPS, however, but in the north half of each (541 F. 2d 1215; SA 8-9). This includes Pike, Washington and Lawrence bordering IPS on the north with steadily increasing black enrollments, 19.28%, 19.01% and 9.0%, respectively, in the 1978-79 school year (D. C. Op., JA 118). Further, the total enrollment of black students in Indianapolis has decreased since 1968 by 1600 students; while the Marion County area outside has an increased enrollment of almost 4400 black students, an increase over this period of 360%, and a decrease in white enrollment of more than 1200 students. (D. C. Op., JA 109-112) Further, during this period, while the enrollment of all Marion County schools has decreased, the enrollments in the school districts surrounding Marion County continue to grow with almost entirely white students. (*Ibid.*)

History of School Boundaries. School districts are organized and operated in Indiana as corporate political entities separate from local civil government pursuant to Art. 8, § 1 of its 1851 Constitution.

After 1852, a series of statutes provided that the school boundaries would generally be coterminous with civil boundaries of towns and cities and with the unincorporated townships outside those boundaries. These statutes were, however, eroded over a number of years by statutes permitting abandonment of school cities and towns and permitting consolidation of school corporations which, once formed, operated without reference to city or town boundary changes. (Dis. Op., JA 41-43)

The continued inadequacy of this system, however, was the subject of The School Corporation Reorganization Act of 1959 (SA 63), which mandated a reorganization plan for each county

redetermining the boundaries of all school corporations and governance of each by a board of school trustees, either elected or appointed, but without *ex officio* officers. The reorganization could take the form of consolidating, subdividing or transferring territory from existing districts or any combination of these methods (SA 65).

The legislative purpose of this Act, set out in Section 1, was to provide a more effective use of public funds for school support, to modify the statutory provisions for school reorganization to assure the maintenance of a uniform and efficient public school system, and to give local electors a voice in establishing an efficient and economical plan best suited to local conditions (SA 64).

Mechanically, the reorganization plan of each county was to be established by county committee with the direction to incorporate all areas of the county into one or more school corporations with boundaries and school board structure which can "provide an adequate educational program in grades one through twelve." (SA 66.) Each county plan then required approval by a state commission and was put into effect by a petition signed by a majority of voters or by a referendum election in each corporation, except that this approval was unnecessary where there was no change in boundaries or board organization of the proposed corporation (SA 72). Because of this Act, the boundaries of 70% of the school corporations in Indiana are not coterminous with any civil government and many cross county lines (573 F. 2d 407; JA 61).

Once school corporation boundaries were determined under this action, they became fixed (541 F. 2d at 1218, SA 14). With respect to Marion County, however, a degree of flexibility was afforded reorganized school corporations by Acts 1961, Ch. 186 (JA 138). This Act provided, first, for a transfer of territory by agreement between two school corporations subject to a court remonstrance by taxpayers in the transferred territory

(JA 139),[8] and second, the right of any former city or town school corporation to annex territory unilaterally (JA 141), subject, however, to a similar remonstrance by taxpayers, and in addition, by the school corporation losing territory (JA 142-43). In each case, the remonstrance depended upon a judicial determination of whether the benefits of the proposed transfer outweighed its detriments, taking into account the interests of the schools and the pupils in both school corporations and in the territory to be transferred (JA 143). The Act, by Section 9, also permitted a third right—the boundary extension of a school corporation which had formerly been a school city or town with any annexation of territory for civil purposes by the city or town (JA 147-50). This right was, however, more limited than, and was not comparable to, the former statutes applicable in Marion County, and much of Indiana, where school boundaries automatically extended with civil annexations, and the section, because of its limitations, was consistent with the purposes of maintaining fiscal and educational efficiency for each corporation required by The Reorganization Act of 1959. Under the limits of Section 9, first, the two involved school corporations could agree not to go along with the extension of territory (JA 149). Second, the school corporation losing territory was entitled to remonstrate in court to the civil annexation in the same manner as taxpayers in the annexed territory under civil annexation statutes—a right theretofore non-existent (JA 148). Third, and more important, the grounds of remonstrance afforded the school were not limited to civil matters as in a taxpayer remonstrance—*e.g.*, whether the city is able to provide municipal services or whether the area is needed for development of the city (SA 61)—but depended on whether the benefits of the annexation outweighed the detriments, taking into consideration the interests of the residents of the civil city, each involved

8. This provision was extended to other counties by Acts 1963, Ch. 296; IC 20-4-4.

school corporation and the annexed territory (JA 148-49; Dis. Op., JA 44, n. 33).

The current school boundaries were substantially established in Marion County under The Reorganization Act by local and state hearings terminating in 1961, with the plan made effective on January 2, 1962 (541 F. 2d at 1218, SA 14). It provided for the absorption by IPS of Center Township schools, and Woodruff Place which was surrounded by IPS and operated no schools (*Ibid;* 368 F. Supp. 1203). Otherwise boundaries remained intact subject to change under the 1961 School Annexation Act described above (573 F. 2d 406, JA 61; 368 F. Supp. 1204), with each corporation governed by a school board established in accordance with the provisions of the School Reorganization Act (SA 66). During the subsequent period until 1969, there were a number of instances under the 1961 School Annexation Act in which IPS boundaries were separated from the civil boundaries (Dis. Op., JA 44, n. 33). There were, however, few civil annexations during this period, and annexation by 1970 had become impossible because of suburban taxpayer opposition (Maj. Op., JA 8; 541 F. 2d 1218, SA 14).

In 1967, before Uni-Gov was conceived, a public discussion took place among the Marion County school corporations as to the desirability of boundary change. IPS at that time adopted a resolution that further expansion was not in its interests, financially or educationally (Maj. Op., JA 10), and the Marion County school corporations, including IPS, collectively drafted and supported a bill in the 1967 General Assembly repealing Section 9 of the School Annexation Act. This bill passed both legislative houses but was vetoed by the Governor (Dis. Op., JA 39, n. 19). It was reintroduced with the same support as in the previous legislative session in 1969, passed both houses and was signed as Acts 1969, Ch. 52 (School Annexation Act Amendment). The Act became ineffective and without function with the passage of Uni-Gov.

Uni-Gov. As is evident from a map of pre-Uni-Gov Indianapolis with its "truncated" shape (573 F. 2d 403; JA 56; 368 F. Supp. 1211), described in 332 F. Supp. 635, 636, as resembling the shape of a "trussed fowl", and the substantial population in Marion County outside the boundaries of the City of Indianapolis, the City had been unable by annexation to keep pace with the area's metropolitan problems. Because annexation by the Indianapolis Civil City had become impossible, an alternative method of handling local civil government problems developed over the years with the creation of a series of independent agencies, some a part of the Indianapolis civil government with boundaries extending beyond the City limits, and others as independent, countywide government entities, each created to solve specific problems.[9] The result was a splintering of governmental responsibility into loosely controlled agencies with overlapping jurisdictions (541 F. 2d at 1220; SA 10). This was the problem Uni-Gov was designed to remedy, and it was accomplished by sidestepping the civil annexation problem (Maj. Op., JA 8).

The Uni-Gov Act created a new entity, a Consolidated City, into which the old city was merged (JA 157) with boundaries extending to the County line, exclusive, however, of the territories in the Towns or Cities of Speedway, Beech Grove, Lawrence and Southport (JA 154-57). This was accomplished, however, without extending Indianapolis' more costly services with their correlative taxes, such as fire, police and sewer, on the theory that, "He who gets the service pays." (JA

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9. Flood Control, IC 19-4-21-3 (1937); Health and Hospital, IC 16-12-21 (1951); Building Authority, IC 19-8-4-1 (1953); Metropolitan Plan Commission, IC 18-7-2 (1955); Park District, IC 19-7-30-2 (1919); Airport, IC 19-6-2-1 (1961); Thoroughfare, IC 19-5-4 (1963); Public Library, IC 20-13-1-10 (1947); Capital Improvements, IC 18-4-17-1 (1965); Mass Transportation, IC 19-5-2-1 (1965); Public Utilities, IC 19-3-24-3 (1929); Sanitary District, IC 19-2-14-7 (1917).

160-65) This fracturing of city service, unrelated to a public improvement, was an innovation in Indiana municipal law inapplicable to any other city or town, creating a new type of city unit by statute.

Uni-Gov then centered budget control of county and city officials and of all civil agencies except certain ones specifically exempted in a combination City-County Council (JA 155, 165-66). The budgets of the more limited fire and police service districts, however, were controlled by the representatives serving in the Council from those areas (IC-18-4-4-5). Further, the Act centralized the administration of non-judicial city and most county employees in the Mayor and in the Directors of departments set up under the Act, appointed by the Mayor with the Council's consent (IC 18-4-4-1).

Certain independent agencies, unnecessary to centralized control, were eliminated either from the budget control or from both the budgetary and administrative control (Maj. Op., JA 8; Dis. Op., JA 40, n. 20; JA 158-159). Schools were exempted (JA 159); they had never been a part of the civil government, are independent separate structures under Indiana's Constitution and statutes (sees *e.g.* I. C. 20-5-1 thru 5), were unnecessary to the purpose for which Uni-Gov was designed, and had in the recent past vigorously defended their independence (Maj. Op., JA 10; Dis. Op., JA 33-35; nn. 11-12).

Both in this case and in others, the courts have recognized that "Uni-Gov was a neutral piece of legislation on its face with its main purpose to efficiently restructure civil government within Marion County." (541 F. 2d at 1220; SA 18.) *See also, Cantwell* v. *Hudnut,* 566 F. 2d 30, 38 (7th Cir. 1977), *cert. denied,* 439 U. S. 1114 (1979) and *Bryant* v. *Whitcomb,* 419 F. Supp. 1290, 1299 (S. D. Ind. 1970).

Had the Marion County school corporations been consolidated as an additional provision of Uni-Gov, the legislation could not have been adopted (D. C. Op., JA 109).

Public Housing. It is superfluous here to set out more than the most essential facts relating to the siting of public housing as these subjects have been extensively treated in both the majority opinion (JA 11-16) and in the dissent (JA 45-51).

HACI is an independent civil city authority. In the period prior to 1969, it had jurisdiction to locate public housing projects within the boundaries of the City of Indianapolis and in an area five miles beyond these boundaries (Maj. Op., JA 13). During this period it erected ten public housing projects designed for families other than the elderly, all in the City of Indianapolis (Maj. Op., JA 13). A majority of these were located in white demographic areas (Maj. Op., JA 14), and were integrative to the extent that black families tended to locate in their vicinity (Maj. Op., JA 22). All locations were approved both by HUD and HACI.

Many of the sites for public housing were chosen by the developers as "turn key" projects—a project where the site is initially selected by the developer, the project built, and turned over as a completed project to HACI (Dis. Op., JA 45). Some of the sites were recommended by a Mayor's task force composed of members of the staff from the Metropolitan Plan Commission, the Uni-Gov predecessor to The Metropolitan Development Commission (*Ibid.*). This task force established a strategy for selecting sites for all types of multi-family dwellings in each section of the County (*Ibid.*). In fact, a substantial amount of federal subsidized housing now occupied by black residents has been located outside the original Indianapolis boundaries (D. C. Op., JA 106-10).

In the course of its duties, the task force contacted the legislative and administrative officials of Marion County, the Commissioners and County Council, who stated they could not furnish the municipal services required by cooperation agreements with the Federal government (Dis. Op., JA 49). Such an agreement is essential to Federal financing and without such an

agreement a public housing project cannot, as a financial matter, be constructed (Maj. Op., JA 15; Dis. Op., JA 47-8). Accordingly, the task force recommended no sites for public housing outside the City of Indianapolis and all ten projects were located within its pre-Uni-Gov limits. Several projects were located adjacent to Indianapolis Civil City boundaries, and in some cases these boundaries were altered by annexation so that public housing projects then built would be located in the City of Indianapolis. (Maj. Op., JA 15).

As a result of compliance with HUD regulations, black persons constituted 98% of those applying for public housing project units. Although the projects opened with a lower percent black residents, they reflect this percentage on a permanent basis. Public housing projects are subject to substantial vacancy (19.2%) (D. C. Op., JA 106) and residents moving out of the projects returned to the original Indianapolis area. There were, in the 1978-79 school year, 2,586 school age children living in these projects (*Ibid.*). There was no evidence that the location of housing projects entirely within the City of Indianapolis increased the black population located there (Dis. Op., JA 51).

Discrimination in Indiana. Indiana, as most states in the Union, had by private acts, and to a lesser extent by public acts now repealed, discriminated against black citizens (456 F. Supp. 186-7; JA 88-9).

With respect to schools: separate schools for black and white students are prohibited by Acts 1949, Ch. 186, p. 503, but prior to that time had been permitted on an optional basis under Acts 1877, Ch. 81, p. 124. There is no showing that, after 1877, separate schools were established for blacks in any of the Marion County school corporations other than IPS. Except for IPS, all Marion County school corporations have always operated unitary schools even with a substantial influx of black students (368 F. Supp. 1203).

Uni-Gov—The Majority Rationale and Its Deficiencies.

The most pertinent fact relied on by the Court of Appeals majority is that *absent some affirmative action by the Indiana Legislature* in 1969, or thereafter, IPS boundaries would not have changed. The pre-remand 1976 Court of Appeals decision notes specifically:

> The annexation powers of the city, however, proved to be illusory, for they were effectively frustrated by remonstrance litigation,

and finds, in addition, that this inability to annex was one of the reasons why Uni-Gov was adopted (541 F. 2d 1218; SA 14, n. 7).

This is even more clearly noted in the Court of Appeals 1980 decision where the majority states (JA 8):

> Civil, as well as school annexations had become all but impossible to achieve because of opposition from the suburban areas which would be affected.

Again the Court of Appeals majority finds that this condition was a necessity for Uni-Gov by "sidestepping" the problems of direct annexation (Maj. Op., JA 8). *In other words, had the Legislature done nothing, there would have been no expansion in IPS boundaries.*

But this means that the segregative impact of the 1969 Legislative Acts (Uni-Gov and the 1969 School Annexation Amendment) on which the majority depends in finding a significant interdistrict segregative effect under *Milliken* (418 U. S. at 744-45), is the failure of the Legislature to expand IPS boundaries. The Court of Appeals majority has, accordingly, created a right in each black child in a segregated central school system under the process of desegregation to have its boundaries expanded to cure the segregation occurring solely within that district.

This is explicit in the majority's pre-remand 1976 decision:

> The General Assembly, under both federal law . . . and Indiana law . . . *had an obligation to alleviate the segre-*

> *gated condition in IPS.* The record fails to show any compelling state interest that would have justified the failure to include IPS in the Uni-Gov legislation. The desirability for a unitary civil government should not have precluded the General Assembly from considering the needs of the school system in its decision to enact Uni-Gov. As we noted earlier, the most substantial reasons advanced against the consolidation of the schools in Marion County when it was under consideration in 1959 were that a consolidated school district would be large, with consequent loss of citizen participation, and that it would increase taxes. These considerations, although apparently not racially motivated, cannot justify legislation that has an obvious racial segregative impact.
>
> 541 F.2d 1211, 1220 (1976), (SA 19) (emphasis added; citations omitted)

In the first decision after remand (573 F. 2d 406-7 (1978); JA 62-65) the majority similarly found the significant interdistrict segregative effect in a failure to expand IPS, under somewhat different legal analysis but without any change in underlying premise—that the legislature had a duty to expand the boundaries of IPS:

> Under prevailing Indiana law prior to 1969, the expansion of the City of Indianapolis to the Marion County lines carried out by the Uni-Gov Act would have automatically caused the concomitant expansion of IPS. But sixteen days before final passage of the Act, the General Assembly repealed Section 9 of the 1961 Act. This repeal for the first time separated the boundaries of IPS and the City of Indianapolis. This action *had the effect of preventing the expansion of IPS boundaries.* But for the repeal of the 1961 Act, IPS would now be coextensive with Marion County and this case would have a far different cast.
>
> 573 F. 2d 401, 406 (1978); JA 63 (emphasis added)

It found further that the adoption of the 1969 School Annexation Amendment, separating school and civil annexation, not only *"had the effect of preventing the expansion of IPS boundaries"* but thereby caused "significant segregation districtwide

effects . . . *curtailing the power of IPS to remedy its own violations.*" (573 F. 2d at 407; JA 64-65).

Here again, the Court of Appeals established a duty on the Legislature to adopt an interdistrict remedy, expanding IPS boundaries, to remedy segregation occurring solely within IPS —a doctrine inconsistent with *Milliken* because that duty is not based on a constitutional violation with significant interdistrict segregative effect.

The 1980 Court of Appeals majority opinion adopts that premise and reasoning flowing from it without further discussion (Maj. Op., JA 2).[10]

In addition to premising its decisions on the duty to expand IPS boundaries, the Court of Appeals majority in both its remand decisions erroneously assumed that Section 9 of the School Annexation Act, had it not been amended, would have provided for an expansion of IPS, either by civil annexation under existing statute or by merger of the City of Indianapolis into a new type of Consolidated City under Uni-Gov with extended boundaries but without an extension of its municipal services.

Judge Swygert in his 1978 plurality opinion makes this bald conclusion without analysis, stating that Section 9 would have operated under Uni-Gov to expand IPS to the County line (573 F. 2d 407; JA 63).[11]

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10. This conclusion as set out in the pre-remand 1976 Court of Appeals majority decision was also accepted without discussion as a premise for the conclusions by the District Court in its 1978 decision (456 F. Supp. 183, 185; JA 87), a conclusion from which the District Court retreats in its 1979 opinion (D. C. Op., JA 109).

11. Even the Consolidated City excludes the Town and City of Speedway and Beech Grove in which there are school districts and the Cities of Southport and Lawrence which are part of the larger metropolitan school districts of Lawrence and Perry.

Judge Fairchild, writing for the majority in the 1980 Court of Appeals opinion states only that such an interpretation "may be appropriate" (Maj. Op., JA 9). He relies on a *definitional* section of the 1961 Annexation Act (§ 1(e), JA 138) which states that civil annexation means "any action whereby the civil boundaries of any civil city are extended." He disregards entirely, however, the provisions of Section 9 which is the only section of the 1961 School Annexation Act relating to the effects of a civil annexation on school boundaries. Under this section a school extension (in addition to the limitations set out on page 10, *supra*) "will become finally effective" solely after a final action, administrative or judicial, in a civil annexation proceeding under Acts 1905, Ch. 129, § 243, as amended (JA 149-150). An annexation under this 1905 Act can only be initiated, however, through a City Council proceeding subject to a taxpayer remonstrance (SA 57, 60).

Since Section 9 becomes operative only by complying with the provisions of the 1905 Act, annexation under this Act had become "impossible." Uni-Gov, by contrast, avoided the limitations of the 1905 Act by creating a new form of municipal government by statute, enlarged in size, totally outside and adopted to avoid the 1905 Act and its impediments. Neither the adoption of Uni-Gov nor the adoption of the 1969 school annexation amendment, repealing Section 9 (which had its historical basis in 1967 before Uni-Gov) therefore, had any impact on school boundaries except to *leave* the situation where it was before 1969 (Dis. Op., JA 39).

The dissenting opinion makes an even more detailed, analytical and penetrating analysis than this text of the absence of any effect on school boundaries, or a change in the legislative policy regarding how school boundaries are set, by the adoption of either Uni-Gov or the 1969 Amendment to the 1961 School

Annexation Statute, and necessarily reaches the same result as this text (JA 36-40, 43-45).

Discriminatory intent in the enactment of the 1969 legislation is then based in the majority opinion on (1) a purported impact which does not exist, (2) a purported change in policy in the relation between school and civil boundaries under the repeal of Section 9 by the 1969 School Annexation Amendment, which, as the dissenting opinion and this text point out, has not occurred (see pp. 19-20 *supra*), and (3) the adoption of the 1969 legislation a few months after this suit was filed and long before a finding of IPS segregation and before interdistrict relief had become either a local or national issue[12] (Maj. Op., JA 10-11).

HACI—Majority Rationale. The Court of Appeals majority finds an impact on school enrollments resulting from the siting of housing projects "by keeping black students within IPS and out of the surrounding school districts" (Maj. Op., JA 13)—a failure in substance by HACI to act with maximum interdistrict integrative effect. Findings of intent by the District Court, which the Court of Appeals found sufficient, were based,

> ". . . on the history of racial discrimination, both public and private, in housing in Marion County; *on the natural and foreseeable results of the site selection practices;* on the absence of convincing no-racial justifications for HACI's failure to locate projects outside of IPS; and on other actions by the Commission not directly related to housing,

12. The suit had been on file for only a few months and was not tried for three years. *Green* v. *Board of Education of New Kent County,* 391 U. S. 430 (1968) had just been decided, and the metropolitan cases of *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.,* 402 U. S. 1 (1971); *Wright* v. *City of Emporia,* 407 U. S. 451 (1972); *Keyes* v. *School District No. 1, Denver, Colo.,* 413 U. S. 189 (1972) and the interdistrict case in *Milliken* v. *Bradley,* 418 U. S. 717 (1974) had yet to be enunciated.

> which led the court to conclude that "the separation of the races, both in housing and in schools, has been an unspoken, but intentional, policy of the Commission."[13]
>
> (Maj. Op., JA 14) (emphasis added)

HACI's failure to obtain a cooperation agreement with county officials was held to be immaterial since according to the Court of Appeals majority, the evidence

> ". . . disclosed no serious attempts by HACI to obtain those agreements."

REASONS FOR ALLOWANCE OF THE WRIT

Uni-Gov and the 1969 Annexation Act Amendment.

1. The Court of Appeals majority's determination that the adoption of these Acts constituted a significant segregative interdistrict school act (Maj. Op., JA 4-5) decides important questions of federal law in conflict with the applicable decisions of this Court.

First, with respect to impact, the majority opinion is premised on the assumption that the 1969 amendment to the 1961 School Annexation Act prevented an expansion of IPS boundaries which would otherwise have occurred with the adoption of the 1969 Uni-Gov civil government reform. As set out above in the analysis of the majority opinion rationale, this is a patent misstatement of the clear language of the 1961 Act (see, pp. 19-20, *supra*). The adoption of Uni-Gov was irrelevant to the operation of the 1961 Annexation Act, amended or otherwise (Dis. Op., JA 38-40).

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13. In arriving at these conclusions, the District Court relied on *Oliver* v. *Michigan State Bd. of Education*, 508 F. 2d 178, 182 (6th Cir. 1974) in shifting the burden of proof to defendants—an incorrect doctrine as determined by this Court in *Dayton Bd. of Ed.* v. *Brinkman*, ... U. S. ....., 61 L. Ed. 2d 720, 733, n. 9 (1979). (D. C. Op., JA 94. *See*, Dis. Op., JA 35, n. 13.)

Even if the majority's assumption were correct, however, the 1969 legislation constitutes a segregative act only if the State has an obligation to correct segregation occurring in a single district, here IPS, by an interdistrict remedy. The Court of Appeals was not, however, dealing with a situation where the legislature in 1969 changed a statute under which IPS boundaries continued to expand along with those of the Civil City. Both boundaries had become substantially fixed. Nor did the Legislature adopt a statute to redraw boundaries; nor is this a situation where *de jure* interdistrict segregation resulted from a cooperative effort between IPS and the surrounding school districts.[14]

In contrast, the Indiana legislature in the course of effecting a very necessary reform of civil government did not, and could not effectively, undertake in addition to remedy the segregation occurring within a single district—IPS, by expansion of the IPS school boundaries or otherwise. The Court of Appeals, however, has affirmed and mandated an interdistrict school transfer to remedy the segregation occurring solely within a single district—an obvious conflict with *Milliken* v. *Bradley*, 418 U. S. 717, 744-747 (1974).[15]

2. Second, aside from the absence of supporting violation, the majority has failed to establish the invidious discriminatory

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14. This is not a case such as *Evans* v. *Buchanan*, 393 F. Supp. 428 (D. Del. 1975) *aff'd.*, 423 U. S. 963 (1975), where the 1968 Delaware legislation in question was directed to consolidating school corporations, but excluded the City of Wilmington which was *de jure* segregated—a segregation which had been mandated by statute prior to 1954 and was a cooperative effort between Wilmington and the defendant suburbs. *See*, 393 F. Supp. at 437; 582 F. 2d 750, 763 (3rd Cir. 1978) (the subsequent proceedings on remedy), and 439 U. S. 1360, 1362-3 (Brennan, J., denying stay).

15. If the simple *failure* to expand the boundaries of a school system guilty of *de jure* segregation is a significant interdistrict segregative act under *Milliken*, then the limits placed on interdistrict relief by that opinion are illusory since the same failure is present in many major metropolitan areas throughout the country, *e.g.*, Detroit.

purpose of the legislature in its 1969 enactments as required by *Washington* v. *Davis,* 426 U. S. 229 (1977) and the principles established under *Village of Arlington Heights* v. *Metropolitan Development Corporation,* 429 U. S. 252 (1977).

The adoption of the 1969 legislation not only had no adverse racial impact on IPS boundaries, but neither the 1961 School Annexation Act, its 1969 Amendment nor Uni-Gov changed the policy for the establishment of boundaries for Marion County School Corporations consistent with the 1959 School Reorganization Act applicable to all Indiana schools (*supra,* pp. 8-11).

The only other evidences of intent are: (1) the adoption of the 1969 legislation within a few months after this case was filed at a time just after *Green* had been decided and before the trial and decision of the major large city desegregation cases or the cases involving interdistrict metropolitan relief had reached this Court (see p. 20, *supra*), and (2) the existence in the past of private and public discriminatory practices in Indiana which are common to many states in the country.[16]

These minimal showings, in the absence of impact, or a change of legislative policy "strongly favoring" a decision contrary to that reached in the course of a legitimate and exemplary reform of civil government, do not establish discriminatory intent. The opinion of the majority to the contrary is in conflict with *Washington* v. *Davis, supra, Village of Arlington Heights* v. *Metropolitan Development Corp., supra,* and *Personnel Administrator of Massachusetts* v. *Feeney,* ..... U. S. ....., 60 L. Ed. 2d 870, 888, n. 25 (1979).

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16. *Cf. City of Mobile* v. *Bolden,* ..... U. S. ....., 48 U. S. L. W. 4436, 4441 (April 22, 1980).

Siting of Public Housing Projects

1. The Court of Appeals majority determination that the siting of public housing projects inside the pre-1970 City of Indianapolis constituted a significant segregative interdistrict school violation decides an important question of federal law which has not been, but should be, clearly settled by this Court.

This Court has rendered an opinion that a Fourteenth Amendment violation by a public authority with responsibility for providing public housing cannot be remedied by a transfer of students.[17] *Armour* v. *Nix,* Civil No. 16708 (N. D. Ga., September 24, 1979) (three-judge court), *aff'd.,* 48 U. S. L. W. 3732 (No. 79-6108; May 12, 1980), holds that no such remedy is available where the involved school corporations all operate unitary school systems or are operating under court-ordered desegregation plans and where none of the plaintiffs alleged that they had been excluded from living in any particular residential area in metropolitan Atlanta (*Armour,* Slip Op., p. 32).

The application of a school remedy to a housing violation adds a new requirement to every housing law and presents unnecessarily difficult judicial problems. Adjustments to the remedy would have to occur yearly under the annual current Federal block grant and other aid systems yet to be devised. The degree of student transfer will always be uncertain;[18] housing

17. *See, Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1, 23 (1971).

18. The District Court in this case determined the number of students to be transferred to adjoining school corporations under the HACI "violation" should be 4958, although only 2586 students live in the housing projects, all on the theory that the 10 housing units built by HACI would be fully occupied, that the remedy should include the projected number of children who would have lived in the housing project built by the federal government in 1936 and that no students in housing projects should be transported to IPS, Washington or Pike (D. C. Op., JA 106, 117).

remedies (*e.g.* anti-redlining) are created despite their aid to residential areas populated by black citizens; and, other housing remedies are amply available to remedy a housing violation.

2. Even if a violation of a housing law also constitutes a school violation requiring the transfer of children, the Court of Appeals majority in finding the requisite racially discriminatory purpose in this case has decided an important question of federal law in conflict with applicable decisions of this Court.

The majority opinion justifies this intent "on the natural and foreseeable results of site selection practices" and "on the absence of convincing nonracial justifications for HACI's failure to locate projects outside of IPS." (Maj. Op., JA 14; *See* D. C. Op., JA 94) But HACI's inability to locate public housing projects outside the City of Indianapolis was its inability to enter into a cooperation agreement with the County Council and the County Commissioners, the governing officials in the County outside incorporated areas.[19] The question is not whether the siting was rational from HACI's standpoint but whether the County was willing to absorb the costs, including a loss of taxes, and was able to perform the services required under a cooperation agreement.[20] The task force that assisted HACI in selecting sites approached the county officials about the possibility of placing projects in their jurisdiction (541 F. 2d 1216; SA 11), but their response was negative since they could not provide the municipal services required by federal law (Dis. Op., JA 49, n. 44). Without any finding of an invidiously discriminatory intent on the part of the county officials, their failure to execute such an agreement, substantially obligating their community, is not, under *James* v. *Valtierra,* 402 U. S. 137 (1971), a Fourteenth Amendment violation. The majority

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19. The majority opinion recognizes such an agreement is a prerequisite to federal financial aid, the sole method by which a public housing project can be financed (Maj. Op., JA 15, n. 19).

20. *See,* the extensive discussion of these obligations in the dissenting opinion, JA 47, n. 38 and JA 48-49, n. 40).

opinion finds a violation in HACI's failure to make any serious attempt to obtain a cooperation agreement; but as Judge Tone said, "I assume the Housing Authority was not required by the Fourteenth Amendment to engage in a futile repetition of the request" (Dis. Op., JA 50).

CONCLUSION

The determination of the District Court and the Court of Appeals majority to order an interdistrict plan to remedy the segregation within Indianapolis has not wavered. For the reasons given, however, they have committed error justifying the granting of this petition for writ of certiorari.

Respectfully submitted,

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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-2067

THE METROPOLITAN SCHOOL DISTRICTS OF LAWRENCE, WARREN AND WAYNE TOWNSHIPS, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF DECATUR TOWNSHIP, MARION COUNTY, INDIANA; THE FRANKLIN TOWNSHIP COMMUNITY SCHOOL CORPORATION, MARION COUNTY, INDIANA,

Petitioners,

vs.

DONNY BRURELL BUCKLEY AND ALYCIA MARQUESE BUCKLEY, BY THEIR PARENT AND NEXT FRIEND, RUBY L. BUCKLEY, ON BEHALF OF THEMSELVES AND ALL NEGRO SCHOOL AGE CHILDREN RESIDING IN THE AREA SERVED BY THE ORIGINAL DEFENDANTS; UNITED STATES OF AMERICA, ET AL.,

Respondents.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

SUPPLEMENTAL APPENDIX.

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SUPPLEMENTAL APPENDIX[1].

OPINIONS BELOW.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.[2]

Nos. 75-1730 through 75-1737, 75-1765, 75-1936, 75-1964, 75-1965, and 75-2007

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

DONNY BRURELL BUCKLEY, ALYCIA MARQUESE BUCKLEY, by their parent and next friend RUBY L. BUCKLEY, on behalf of themselves and all Negro school age children residing in the area served by the original defendants herein,
Intervening Plaintiffs-Appellees,

vs.

BOARD OF SCHOOL COMMISSIONERS OF CITY OF INDIANAPOLIS, INDIANA, et al.,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. IP-68-C-225

S. HUGH DILLIN, *Judge.*

Argued December 3, 1975—Decided July 16, 1976

1. This Appendix is supplemental to the Joint Appendix filed by the petitioners, The Metropolitan School District of Perry Township and Otis R. Bowen, *et al.*, which is adopted by the petitioners filing this Supplemental Appendix.

2. Reported at 541 F. 2d 1211.

Before FAIRCHILD, *Chief Judge*, SWYGERT and TONE, *Circuit Judges.*

SWYGERT, *Circuit Judge.* This is the third review of successive desegregation orders in a suit brought in 1968 by the United States against the Board of School Commissioners of the City of Indianapolis. The issue before us, as in *Milliken* v. *Bradley*, 418 U. S. 717 (1974), concerns the appropriate exercise of federal equity jurisdiction. The district court found two violations of the Equal Protection Clause upon which it based the interdistrict remedies that are at issue on this appeal. The first was the failure of the state to extend the boundaries of the Indianapolis Public School District (IPS) when the municipal government of Indianapolis and other governmental units in Marion County, Indiana, were replaced by a consolidated county-wide government called Uni-Gov. The second violation was the confinement of all public housing projects (in which 98 percent of the residents are black) to areas within the boundaries of the City of Indianapolis.

On the basis of these violations the district court determined that a limited interdistrict remedy would be appropriate. The court ordered a transfer of black IPS students in grades 1-9 to suburban school districts (except two) within Marion County in such number as to cause the total enrollment of pupils in the suburban schools to be 15 percent black after the transfer. The district court also enjoined the Housing Authority of the City of Indianapolis from constructing any future public housing projects inside the boundaries of IPS and from renovating a housing project known as Lockefield Gardens for other than elderly persons.

On the basis of the entire record and the findings of the district court, we affirm.

I.

The History of the Case

The history of this litigation was described in our most recent opinion, *United States* v. *Board of School Commissioners of*

City of Indianapolis, Indiana, 503 F. 2d 68, 71-75 (7th Cir. 1974), *cert. denied,* 421 U. S. 929; nonetheless, a brief summary is appropirate.

There have been four phases in this suit. In *Indianapolis I* the sole issue was racial segregation within the schools in the Indianapolis Public School District. Judge Dillin, after noting Indiana's official policy of school segregation until 1949, reviewed the conduct of IPS since that year and found the school district guilty of *de jure* segregation. *United States* v. *Board of School Commissioners of City of Indianapolis, Indiana,* 332 F. Supp. 655 (S. D. Ind. 1971).

The court then ordered the United States to add as defendants other school districts in the metropolitan area in order to provide the proper setting for consideration of the appropriateness of a metropolitan remedy. The Government complied with the order. The Buckley plaintiffs, representing a class of black school children, were granted permission to intervene. They joined as defendants several state officials and additional school districts.

On appeal this court affirmed, finding that there was a clear pattern of purposeful discrimination in the gerrymandering of school attendance zones, in the segregation of faculty, in the use of optional attendance zones among the schools, and in school construction and placement—a "[P]attern of decision making which . . . reflected a successful plan for *de jure* segregation." *United States* v. *Board of School Commissioners of City of Indianapolis, Indiana,* 474 F. 2d 81, 84-88 (7th Cir. 1973), *cert. denied,* 413 U. S. 920.

After remand from this court, the district court in *Indianapolis II* took up the problem of fashioning a remedy. One of the issues at trial was the constitutionality of the Uni-Gov Act. The court ordered a remedy without reaching this question. The court found that a meaningful permanent desegregation plan could not be accomplished within the boundaries of IPS, based upon evidence that when the percentage of blacks in a given school

approaches 25 to 30 percent white flight accelerates, resulting in resegregation. *United States* v. *Board of School Commissioners of City of Indianapolis, Indiana,* 368 F. Supp. 1191 (S. D. Ind. 1973). The court further found that the State of Indiana, its officials, and agencies by various acts and omissions promoted segregation and inhibited desegregation within IPS, so that the state which was ultimately charged under the Indiana law with the operation of its public schools had a continuing affirmative duty to desegregate the Indianapolis school system.

The court then ordered a broad interdistrict remedy which encompassed the entire metropolitan area including school distrists outside of Marion County. The court held it was the duty of the state, through its General Assembly, to devise its own plan of desegregation, with the understanding that if it failed to do so within a reasonable time the court would have the authority and duty to formulate its own plan. As interim relief, the court ordered IPS to effect pupil reassignment for the 1973-1974 school year sufficient to bring the number of black pupils in each of its elementary schools to approximately 15 percent.

In response to the court's order for the interim relief, IPS submitted a desegregation plan. The court rejected it as inadequate and appointed a two-member commission to develop a plan. This plan was approved by the court and has been implemented. The district court also ordered IPS to transfer to certain defendant school districts a number of black pupils equal to 5 percent of the 1972-1973 enrollment of each transferee school (with certain exceptions). (This portion of the order was stayed incident to subsequent proceedings.) *United States* v. *Board of School Commissioners of City of Indianapolis, Indiana,* 368 F. Supp. 1223 (S. D. Ind. 1973).

In *Indianapolis III* the court issued a supplementary opinion in which Judge Dillin proffered recommendations to the State of Indiana for implementing a desegregation plan. In response, the General Assembly adopted a bill that provides for the adjust-

ment of tuition among the transferor and the transferee districts and for the reimbursement of transportation costs by the state whenever a federal or state court makes certain findings.[1]

On appeal from *Indianapolis II and Indianapolis III* this court, besides affirming the commission's interim IPS plan, affirmed the district court's holding that the State of Indiana, as the ultimate body charged with responsibility of operating its public schools, "[H]as an affirmative duty to assist the IPS Board in desegregating IPS within its boundaries. . . ." *United States* v. *Board of School Commissioners,* 503 F. 2d 68, 80 (7th Cir. 1974), *cert. denied,* 421 U. S. 929. This court, however, in accordance with *Milliken* v. *Bradley,* 418 U. S. 717 (1974), reversed the district court's order pertaining to the interdistrict remedy as to those school districts outside of Uni-Gov (Marion County). That portion of the order pertaining to the interdistrict remedy within Uni-Gov was vacated and remanded for further proceedings. We said:

> The district court should determine whether the establishment of the Uni-Gov boundaries without a like reestablishment of IPS boundaries warrants an interdistrict remedy within Uni-Gov in accordance with *Milliken,* 503 F.2d at 86.

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1. The Indiana Statute, Acts 1974, P. L. 94, § 1; I. C. 1971, 20-8.1-6.5-1, Burns Ind. Stat. Ann. § 28-5031 (1971), provides in pertinent part:

> This chapter applies solely in a situation where a court of the United States or of the State of Indiana in a suit to which the transferor or transferee corporation or corporations are parties has found the following: (a) a transferor corporation has violated the equal protection clause of the Fourteenth Amendment to the Constitution of the United States by practicing de jure racial segregation of the students within its borders; (b) a unitary school system within the meaning of such Amendment cannot be implemented within the boundaries of the transferor corporation, and (c) the Fourteenth Amendment compels the Court to order a transferor corporation to transfer its students for education to one or more transferee corporations to effect a plan of desegregation in the transferor corporation which is acceptable within the meaning of such Amendment.

On remand, in *Indianapolis IV* (unreported opinion), the district court held another evidentiary hearing on Uni-Gov and housing practices within Marion County. In regard to Uni-Gov Judge Dillin found:

> The evidence clearly shows that at the time of the passage of the Uni-Gov Act in 1969, various annexation plans and school consolidation plans had bogged down on the local level because of the aforementioned opposition of the suburban school corporations within Marion County, and their patrons. . . . When the General Assembly [which under state and federal law had a duty to alleviate segregation in IPS] expressly eliminated the schools from consideration under Uni-Gov, it signaled its lack of concern with the whole problem and thus inhibited desegregation [*sic*] IPS.

Referring to the suburban Marion County units of government, he stated:

> They have resisted school consolidation, they resisted civil annexation so long as civil annexation carried school annexation with it, they ceased resisting civil annexation only when the Uni-Gov act made it clear that the schools would not be involved. Suburban Marion County has resisted the erection of public housing projects outside IPS territory, suburban Marion County officials have refused to cooperate with HUD on the location of such projects, and the customs and usages of both the officials and inhabitants of such areas has [*sic*] been to discourage blacks from seeking to purchase or rent homes therein, all as shown in detail in previous opinions of this Court.

With respect to the public housing authorities the district judge said:

> The evidence is undisputed that each and every public housing project constructed and operated by the added defendant HACI is located within IPS territory, in some instances just across the street from territory served by one of the added defendant school corporations. Each of such locations was approved—in some instances selected in the first place—by the added defendant Commission. The latter

> institution has had county-wide zoning jurisdiction at all times during the construction of 10 out of the 11 public housing projects for families, and HACI has at all times had the authority to erect public housing within the City of Indianapolis, and within five miles of the corporate limits of such city. The residents of said public housing projects are approximately 98% black (except in projects for the elderly), and their children all attend school in IPS. The location of these housing projects by instrumentalities of the State of Indiana has obviously tended to cause and to perpetuate the segregation of black pupils in IPS territory.

Based on these findings and those set forth in his former opinions, Judge Dillin ruled that an interdistrict remedy was necessary to effect desegregation within IPS. He again found that if desegregation were limited to IPS, schools within IPS would become 42 percent black, and that this percentage exceeded the "tipping point" at which resegregation would occur. He commented:

> The Court of Appeals has called the attention of this Court to the rule of law that "white flight" is not an acceptable reason for failing to dismantle a dual school system. 503 F.2d 80, citing *United States* v. *Scotland Neck City Board of Education,* 407 U.S. 484, 491, 92 S.Ct. 2214, 2218, 33 L.Ed.2d 75 (1970). However, it does not follow that this Court must ignore the probability of white flight in attempting to formulate guidelines for IPS to follow in accomplishing the final desegregation of its schools. In other words, as this Court sees it, white flight may not be used as an excuse for inaction; it may, however, supply the reason for a particular kind of action.

Judge Dillin therefore ordered the transfer of 6,533 students from IPS to other school districts in Marion County. An additional 3,000 students were to be transferred in the second year of the plan, raising the proportion of black students in the suburban schools to 15 percent.[2] No transfers were ordered to

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2. IPS will be obligated to pay the suburban school districts the cost of educating the transferred pupils. See *supra,* n. 1.

Washington and Pike Townships, which already had black populations of 15 and 12 percent. The district court also enjoined the Housing Authority from building any more family housing projects in IPS territory and from renovating an all black project called Lockefield Gardens. Finally, the Buckleys were awarded attorneys' fees under 20 U. S. C. § 1617.

All the defendants have appealed. The defendants other than the Housing Authority challenge the interdistrict transfers ordered by the district court. The Housing Authority challenges the injunction against it. On the other side, the Buckleys, together with an *amicus curiae,* the Coalition for Integrated Education, argue for affirmance of the district court order. The United States argues that the finding of interdistrict violations should be sustained but seeks modification of the portion of the order calling for mandatory interdistrict transfers of students. It argues for affirmance of the injunction against the Housing Authority.

II

Facts Pertinent to This Appeal

A. Residential and School Demography of Marion County

In 1969 when Uni-Gov was created, 95 percent of the blacks in Marion County lived in Indianapolis. Only about 50 percent of the whites in the county lived in the city. The black population continues to grow within the core city as reflected by the ratios in the schools. The percentage of black students in IPS increased from 36 percent in 1968 to 42 percent in 1975. The 1974-1975 black/white ratio in IPS was 57.22 percent white and 42.16 percent black. On the other hand, the overall ratio in

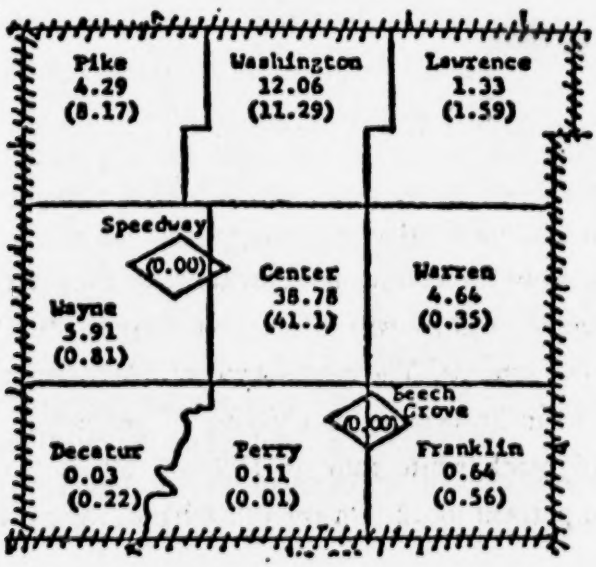
Marion County was 74.87 percent white and 24.40 percent black.[3] For the years 1974-1975 the racial composition of the suburban school districts within Marion County was as follows:

Township	Percentage of White	Percentage of Black
Decatur	99.83	.9
Franklin	99.35	.54
Lawrence	95.50	2.9
Perry	98.64	.23
Warren	98.61	.73
Wayne	97.87	1.19
Beech Grove	99.64	.04
Speedway	99.10	.72

3. The black population in Marion County is reflected by the following map.

1973

Percentage of Black Residents in Marion County
(Percentage of Black Students in Marion County Schools)



B. Uni-Gov

Until 1969 the boundaries of IPS corresponded roughly to the boundaries of the City of Indianapolis, and the other Marion County school districts were truly suburban. In 1969, however, the so-called Uni-Gov Act, which is officially titled the "First Class Consolidated Cities and Counties Act," Acts 1969, ch. 173, § 101; I. C. 1971, 18-4-1-1 *et seq.*, Burns Ind. Stat. Ann. §§ 48-9101 *et seq.* (1971), transformed Marion County into a consolidated metropolitan government. School districts were specifically excluded from Uni-Gov.

Uni-Gov is governed by a mayor and council. Its purpose was to efficiently reorganize civil government within Marion County. Previously, there had been a splintering of governmental responsibility into loosely controlled agencies with overlapping jurisdictions. Uni-Gov has succeeded to most of the functions of county government and of numerous special service districts. It has also succeeded to the functions of the City of Indianapolis and provides municipal services such as police and fire protection within the approximate area of the old city. The Act contains provisions for expanding the areas in which Uni-Gov delivers these municipal services. See, *e.g.*, I. C. 1971, 18-4-12-36 (fire district); I. C. 1971, 18-4-12-8 (police district).

Uni-Gov has not, however, replaced all existing governmental units in Marion County. For example, the airport authority, the county courts, the building authority, and the hospital corporation were excluded from Uni-Gov. The so-called "excluded cites" of Speedway, Perry, and Lawrence retain their own local governments which provide municipal services in those areas. Nonetheless, Uni-Gov has significant powers even in the excluded cities. It is in charge of air pollution regulation, building code enforcement, and municipal planning and thoroughfare control. Moreover, the citizens of the excluded cities vote in Uni-Gov elections.

C. History of Public Housing

Between 1966 and 1970 the Housing Authority built and opened for occupancy ten housing projects for low-income families. These and Lockefield Gardens, which was built during the depression, are the only public housing projects for family occupancy in Marion County, although other forms of subsidized housing are available. All ten projects were built within the boundaries of IPS. These projects opened with 50 to 75 percent black occupancies and are now 98 percent black.

The Housing Authority was authorized under state law to construct projects within Indianapolis and within five miles of the city's boundaries. Federal funding could be obtained only if the Housing Authority entered into a cooperation agreement with the municipality or other civil governmental entity having jurisdiction over the territory in which it desired to build. The City of Indianapolis entered into a cooperation agreement with the Housing Authority, but no other governmental entity in Marion County did so, even though the Housing Authority approached the county commissioners about an agreement.

Since 1969, when Uni-Gov became effective, the Housing Authority has apparently had the authority to construct projects outside the old city limits, except in the Towns of Speedway, Lawrence, and Beech Grove, without the need for cooperation agreements. No housing projects have been commenced within or outside IPS since that time nor are any planned. The record does not show why. There are presently pending applications for approximately 3,000 families.

The Housing Authority argued that suitable sites did not exist outside the City of Indianapolis because services such as public transportation would have been unavailable. There was evidence, however, that these services could have been arranged. The evidence showed that public transportation routes could have been extended to areas of demonstrated need, that food stamp distribution offices could have been established at the

projects, that sewages services could have been obtained by contract with the city, and that police and fire protection could have been obtained from the city.

Six of the housing projects are on the IPS boundary lines or within a few blocks thereof. For example, Clearstream Gardens was located on the IPS side of a street which divided IPS and Warren Metropolitan School District. A witness for the Housing Authority under questioning by the district court, was unable to state why, "from the standpoint of these criteria you mentioned," there was "any difference at all between the location on the east side or the west side of Emerson Avenue." The other projects and their locations are set forth below.[4] These projects contain between 900 and 1,000 family units and house a substantial number of black school children.

D. History of School District Boundaries

Until 1969, under a variety of laws which are discussed below, the IPS boundaries were largely coterminous with the city boundaries. Under a 1931 act, the boundaries of IPS were made coterminous with those of the city. Acts 1931, ch. 94, § 1; I. C. 1971, 20-3-11-1, Burns Ind. Stat. Ann. § 28-2601 (1971).[5]

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4. Rowney Terrace is ten blocks north of Clearstream Gardens on the same boundary line between IPS and Warren Metropolitan School District (MSD).

Raymond Village is approximately four blocks north of the boundary line between IPS and Beech Grove.

Laurelwood is in a narrow peninsula of IPS that is surrounded on three sides by Perry MSD.

Concord Village is approximately one-half mile from the Speedway boundary.

Eagle Creek is on the boundary line between IPS and Wayne MSD.

5. Acts 1963, ch. 310, § 4; I. C. 1971, 20-3-11-33, Burns Ind. Stat. Ann. § 28-2633 (1971), provides that the 1931 act remains in effect except to the extent that its various provisions are inconsistent with the 1959 act discussed in the text. The provision of the 1931 act making IPS boundaries coterminous with those of Indianapolis is inconsistent with the 1959 act and consequently was not reenacted by the 1963 act. The 1963 act did not purport to affect the provisions of the 1961 act discussed in the text.

Until 1959, boundaries of school districts and municipalities were also coterminous elsewhere in Indiana, with some exceptions, and the IPS boundaries merely reflected the generally prevailing condition.

In 1959 the Indiana School Reorganization Act, Acts 1959, ch. 202, § 1; I. C. 1971, 20-4-1-1 *et seq.*, Burns Ind. Stat. Ann. § 28-3501, n (1971), created a complex scheme for consolidating school districts. Consolidations under the Act reduced the number of school districts outside Marion County from 990 to 305. Some 70 percent of reorganized districts were not coterminous with other units of civil government. In some cases consolidated school districts crossed county lines.

Marion County, however, was an exception. School districts there were not consolidated. The Marion County Reorganization Committee, appointed pursuant to the Act, initially recommended that all school systems in the county be merged into one, but the unanimous opposition of the suburban school districts defeated the merger proposal. There is no evidence that this opposition was racially motivated.[6] The Committee's ill-fated consolidation proposal was intended to "develop equal educational opportunities for all children in Marion County," and to "eliminate the confusion of school transfers and dislocations involved in annexation proceedings."

The most substantial reasons against consolidation noted in the Committee's report were that a consolidated school district would be large, with consequent loss in citizen participation and interest in school affairs, and that merger would result in increased school taxes in IPS and two of the suburban districts. The Committee explained that the consolidation plan "had no widespread support—only organized opposition," and that it did

6. The district judge's comment is pertinent. "In fact, the evidence shows that, with a few exceptions, none of the added defendants have had the opportunity to commit such overt acts because the Negro population residing within the borders of such defendants ranges from slight to none, . . ." *United States* v. *Board of School Commissioners,* 368 F. Supp. at 1203.

not wish to "force a plan (however sound in its conception) upon an unwilling or reluctant public." So, although it believed the arguments in favor of its plan far outweighed the opposition arguments, the Committee, as the district court found, "[R]eversed itself and proposed a plan which, with minor exceptions . . . froze all existing school corporations in Marion County according to their then existing 1961 boundaries." *United States* v. *Board of School Commissioners,* 368 F. Supp. 1191, 1203 (S. D. Ind. 1973). The Committee thereby abandoned both its merger plan and a less radical plan which would have restructured school boundaries on what the Committee regarded as a more rational basis than existing boundaries. Accordingly, the plan adopted in 1962, after approval by the state, did not significantly change boundaries in Marion County, but left those boundaries coterminous with those of civil governmental bodies.

As a result of the 1959 Reorganization Act, school boundaries in most of the state were frozen and thereafter unaffected by municipal annexations. In 1961, however, special legislation was enacted to give the schools within Marion County the flexibility lost by the 1959 Reorganization Act. Acts 1961, ch. 186, § 1; I. C. 1971, 20-3-14-1 *et seq.*, Burns Ind. Stat. Ann. § 28-3610 (1971). Under the 1961 act extension of the boundaries of a civil city automatically extended the corresponding school district boundaries unless the school city and the losing school corporation mutually agreed that the school city territory would not expand with the civil city. The school district whose territory was to be taken could also oppose the civil annexation in a remonstrance suit. The annexation powers of the city, however, proved to be illusory, for they were effectively frustrated by remonstrance litigation.[7]

Another means of annexation under the 1961 act was by mutual agreement between school corporations. IPS (and other

7. This frustration of the city's annexation efforts was one of the reasons for Uni-Gov given by Mayor Lugar in his testimony before the district court.

school districts with boundaries corresponding with those of a civil city) also had a unilateral power of annexation subject to the right of the school district whose territory was to be taken to oppose by remonstrance. No significant action was taken by IPS under this provision.

In summary, until 1969, the combined action of the State of Indiana and its political subdivisions had the effect of leaving the boundaries of the City of Indianapolis and IPS substantially the same despite statewide school district consolidations made under the 1959 act. True, IPS could expand independently of the city, but the city's annexation prima facie carried IPS with it. Although it turned out that no annexations occurred, the policy of the state, as expressed in the 1961 legislation, was that IPS would expand along with the city.

In 1969, after this action was filed, two other acts were adopted. One act, Acts 1969, ch. 52, § 3; I. C. 1971, 20-3-14-9, Burns Ind. Stat. Ann. § 28-3618 (1971), adopted sixteen days before Uni-Gov was enacted, amended the 1961 act by abolishing the power of IPS to follow municipal annexations. Another act, Acts 1969, ch. 239, § 407; I. C. 1971, 18-5-10-25, Burns Ind. Stat. Ann. § 48-722 (1971), limited the remonstrances against municipal annexations to a few, simple, fairly objective grounds.

III.

The overall issue in this appeal is whether the limited interdistrict remedy ordered by the district court is supported by the record and is in accord with the legal principles enunciated in *Milliken* v. *Bradley*, 418 U. S. 717 (1974). Subsumed in the issue are two questions: (1) whether the establishment of Uni-Gov boundaries without a like reestablishment of IPS boundaries warrants an interdistrict remedy within Uni-Gov, and (2) whether the district court correctly enjoined the Housing Authority of the City of Indianapolis from locating any additional publicly funded housing projects within the boundaries of

IPS and from renovating any existing facility for other than the elderly.[8]

In our opinion, *Milliken's* essential holding is contained in the following language written by Mr. Chief Justice Burger:

> The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. *Swann,* 402 U. S., at 16. Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. *Specfically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation.* Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately

8. The school district defendants argue that our mandate limited inquiry on remand to Uni-Gov itself. It is true that our remand "[F]or further proceedings consistent with" *Milliken* v. *Bradley* was qualified by the specific direction to "[D]etermine whether the establishment of the Uni-Gov boundaries without a like reestablishment of IPS boundaries warrants an inter-district remedy within Uni-Gov in accordance with *Milliken.*" *United States* v. *Board of School Commissioners,* 503 F. 2d 68, 86 (7th Cir. 1974), *cert. denied,* 421 U, S. 929. This direction, however, was itself qualified by a footnote quoting from passages in the opinion of the Court in *Milliken* and in Mr. Justice Stewart's concurring opinion. Both passages mention the drawing of school district lines on the basis of race as a possible ground for interdistrict relief; the former also includes as a possible ground discriminatory acts of other school districts; and the latter mentions "[P]urposeful, racially discriminatory use of state housing or zoning laws" by state officials. *Id.* at n. 23. We interpret the mandate as sufficiently broad to permit consideration of official conduct which arguably bears a historical relationship to the failure to expand the IPS boundaries to match those of Uni-Gov, which includes the failure to change IPS boundaries during the 1959-1962 Indiana school reorganization program and the failure to locate any public housing outside the IPS boundaries. On the intervening plaintiffs' theory of the case, which the district court adopted, this course of conduct was a part of a pattern, of which Uni-Gov was also a part.

> drawn on the basis of race. In such circumstances an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional violation. Conversely, without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy. (emphasis added.) *Milliken* v. *Bradley*, 418 U. S. 717, 744-45.

That holding was further explicated in *Hills* v. *Gautreaux*, 44 U. S. L. W. 4480, 4484 (U. S. April 20, 1976), where Mr. Justice Stewart wrote:

> The Court's holding that there [*Milliken* v. *Bradley*] had to be an interdistrict violation or effect before a federal court could order the crossing of district boundary lines reflected the substantive impact of a consolidation remedy on separate and independent school districts. The District Court's desegregation order in *Milliken* was held to be an impermissible remedy not because it envisioned relief against a wrongdoer extending beyond the city in which the violation occurred but because it contemplated a judicial decree restructuring the operation of local governmental entities that were not implicated in any constitutional violation.

In *Milliken* the majority opinion also noted that, "[I]n its present posture the case does not present any question concerning possible state housing violations." *Milliken* v. *Bradley*, *supra* at 728, n. 7. Mr. Justice Stewart, in his concurring opinion, explicitly explained the relevance of housing discrimination as it relates to an interdistrict remedy in school desegregation cases. Mr. Justice Stewart wrote:

> Were it to be shown, for example, that state officials had contributed to the separation of the races by drawing or redrawing school district lines, . . . by transfer of school units between districts, . . . or by purposeful, racially discriminatory use of state housing or zoning laws, then a decree calling for transfer of pupils across district lines or for restructuring of district lines might well be appropriate. *Id.* at 755.

With these holdings in mind we turn to the issue of Uni-Gov as it relates to an interdistrict violation.

Although Uni-Gov was a neutral piece of legislation on its face with its main purpose to efficiently restructure civil government within Marion County, it cannot be analyzed in isolation if its impact on school district boundaries is to be clearly perceived. Rather it must be considered in conjunction with the two other acts adopted in 1969. (See *supra* pp. 12-13.)

For some time Mayor Lugar had expressed his desire to embark on a more aggressive annexation program in order to bring a greater part of the urbanized area under the city's control. The concept of Uni-Gov was promoted as a more viable alternative to lengthy annexation litigation.[9] The suburban school corporations and their legislative representatives were obviously aware that if Uni-Gov did not pass and the civil city was forced to embark on a more aggressive annexation program as a last resort to reorganizing governmental services, IPS boundaries would automatically extend with the civil city boundaries under the 1961 Annexation Act.[10] In order to avoid this undesired result Chapter 52, 1969 Acts was enacted sixteen days before Uni-Gov was adopted. This Act repealed the provision in the 1961 Act which provided for automatic extension of school city boundaries with the extension of civil boundaries. Chapter 239, 1969 Acts was also adopted, limiting remonstrances against municipal annexations to a few, simple, fairly objective grounds.

It must be kept in mind that at this time both the General Assembly and the suburban school districts knew that this

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9. Prior city administrations had not strongly pursued civil annexations and those that had been adopted were being effectively thwarted by remonstrances in the courts.

10. Under the 1961 Annexation Act the only way to avoid automatic extension of the school city boundaries, other than by remonstrance, was by mutual agreement between the acquiring and losing school corporations that the school city boundaries would not extend with the civil city boundaries.

action was pending in district court. These "fail safe" measures indicated a legislative intent (reflecting local sentiments) that by one means or another the boundaries of IPS would not expand with those of the civil city. We say this because a court is entitled to draw reasonable and logical inferences from probable consequences of changes in the law and the evident purpose of such changes.

Because, in 1969, 95 percent of the blacks in Marion County lived in the inner city and segregation in its schools was under attack in federal court, it is clear to us that Uni-Gov and its companion 1969 legislation were "[A] substantial cause of inter-district segregation." *Milliken* v. *Bradley,* 418 U. S. 717, 745 (1974), and "[C]ontributed to the separation of the races by . . . redrawing school district lines. . . ." *Id.* at 755 (Stewart, J., concurring).

The General Assembly, under both federal law as expressed in *Brown* v. *Board of Education,* 349 U. S. 294 (1955), and in *Green* v. *County School Board,* 391 U. S. 430 (1968), and Indiana law as expressed in Acts 1949, ch. 186, §§ 1-6, 8, as repealed by Acts 1973, P. L. 218, § 1; I. C. 1971, 20-8.1-2-1 —20-8.1-2-7, Burns Ind. Stat. Ann. § 28-5304 (1971), had an obligation to alleviate the segregated condition in IPS. The record fails to show any compelling state interest that would have justified the failure to include IPS in the Uni-Gov legislation. The desirability for a unitary civil government should not have precluded the General Assembly from considering the needs of the school system in its decision to enact Uni-Gov. As we noted earlier, the most substantial reasons advanced against the consolidation of the schools in Marion County when it was under consideration in 1959 were that a consolidated school district would be large, with consequent loss of citizen participation, and that it would increase taxes. These considerations, although apparently not racially motivated, cannot justify legislation that has an obvious racial segregative impact. Administrative convenience cannot be a justification for violating

the Equal Protection Clause. The district court correctly observed, "When the General Assembly expressly eliminated the schools from consideration under Uni-Gov, it signaled its lack of concern with the whole problem and thus inhibited desegregation with [*sic*] IPS."

In summary, we are convinced that the essential findings for an interdistrict remedy found lacking in *Milliken* are supplied by the record in the instant case. In *Milliken* the Supreme Court noted that the Detroit school boundaries were coterminous with the civil city boundaries and "[W]ere established over a century ago by neutral legislation. . . ." *Milliken* v. *Bradley*, 418 U. S. 717, 748 (1974). The Court also observed the district court did not find that the segregative acts within Detroit effected segregation within the other districts. *Id.* at 721. Furthermore, the suburban school districts had not participated in the proceeding, *id.* at 722, and finally, there had been no evidence of any racially discriminatory acts of the state which had been substantial causes of interdistrict segregation, *id.* at 745. The remedy chosen by the district court required a consolidation of fifty-four districts" into a vast new super school district," *id.* at 743.

Indianapolis presents an entirely different situation. The Indianapolis Legislature [*sic*] acted directly in passing Uni-Gov, thereby creating the existing situation which confines black students within IPS. Moreover, the suburban governmental units made it politically expedient that Uni-Gov not include the schools.

In this case we are dealing with a situation in which but for certain events chargeable to the state, Marion County would be either a consolidated school district under the 1959 School Reorganization Act or IPS would have been expanded with the civil city of Indianapolis under Uni-Gov. In this context there is nothing talismanic about the word "district", for school district lines are not sacrosanct. *Milliken, supra* at 744. The following hypotheticals are helpful in analyzing the problem.

(a) City A has one school district, coterminous with City A. The Government brings a suit, alleging *de jure* segregation in the city schools, particularly in the northeast portion of the city. The defendant school board agrees that the northeast portion of the city must be desegregated, but argues that a district wide remedy is unnecessary, that is, that only the schools in the northeastern portion of City A need be affected. On these facts, *Keyes* v. *School District No. 1*, 413 U. S. 189, 208 (1973), would control.

(b) City B has one school district that is coterminous with city boundaries. Perhaps fearing an impending desegregation suit, City B decides to contract its school district boundaries so that the school district encompasses the bulk of the central city while the outlying areas of the city organize their own school districts. On these facts, no federal court in a desegregation suit would hesitate in ordering the crossing of district lines to effect a remedy.

(c) City C decides to expand its boundaries and annexes the suburbs surrounding it into a unitary civil government. However, it retains its school district boundaries, previously coterminous with its former city boundaries. In every other respect it provides full city services in and exercises full city authority over the newly acquired territory. These facts are analogous to those of the case at bar. In the event of a meritorious desegregation suit in hypothetical City C, a district court could properly order an interdistrict remedy under *Milliken*.

There is no dispute that a school district may not contract its territory in order to avoid desegregation. *Cf. Wright* v. *Council of City of Emporia*, 407 U. S. 451 (1972). Conversely, a city should not be permitted to extend its boundaries in order to avoid desegregation.

Evans v. *Buchanan*, 393 F. Supp. 428 (D. Del. 1975), *aff'd*, ... U. S. ....., 44 U. S. L. W. 3299 (1975), is a case which is factually analogous to the instant case in many respects and in accord with *Milliken*. In *Evans* the district court had to consider the segregative effects of the Education Advancement Act of 1968, a Delaware school reorganization statute, which ex-

plicitly excluded the Wilmington district from a general reorganization of Delaware school districts. Although the district court concluded that the provisions excluding the Wilmington district from school reorganization were not purposefully, racially discriminatory, this did not end its inquiry. The court noted, "Statutes that do not explicitly deal with race but have a pronounced racial effect, . . . can also establish suspect racial classifications." *Evans* v. *Buchanan, supra* at 441. It further stated that "[W]here a statute, either explicitly or effectively, makes the goals of a racial minority more difficult to achieve than other related governmental interests, the statute embodies a suspect racial classification and requires a particularly strong justification." *Id.* The court therefore held that the Education Advancement Act, although racially neutral on its face, "[H]ad a significant racial impact on the policies of the State Board of Education, . . ." *id.* at 442-443, and thereby constituted a suspect classification. In effect, the statute prevented a predominantly black school district from being reorganized with a predominantly white suburban school district while other districts in the state were able to consolidate. The court finally concluded that "Neither . . . interest in preserving a historic school district boundary, nor the interest in maintaining districts with enrollments below 12,000 . . .," *id.* at 445, was a compelling state interest and did not justify the exclusion of Wilmington in the Education Advancement Act. On this basis the district court ordered an interdistrict remedy. The Supreme Court summarily affirmed.

In light of the above we find that the limited interdistrict remedy ordered by the district court was proper.

IV.

We now turn to the housing issue. As we stated above 95 percent of the black residents of Marion County live in the inner city. Surrounding the inner city are suburbs populated largely by white residents. This phenomenon may have many causes, but

we think the district judge was correct in finding as the primary reason discrimination in the availability of housing opportunities for blacks in the suburbs. We are in agreement with Judge Dillin's statement:

> Although it is undoubtedly true that many factors enter into demographic patterns, there can be little doubt that the principal factor which has caused members of the Negro race to be confined to living in certain limited areas (commonly called ghettos) in the urban centers in the north, including Indianapolis, has been racial discrimination in housing which has prevented them from living any place else. *United States* v. *Board of School Commissioners,* 68 F. Supp. 1191, 1204 (S. D. Ind. 1973).

Although the Housing Authority had jurisdiction outside the IPS boundaries, it did not locate any of the public housing projects in that territory. Instead, all ten of the public housing projects whose occupancy is 98 percent black were located within IPS. It is obvious that there is a close relationship between the racial balance in housing and the racial balance in schools. As Judge Dillin found in his 1971 opinion, "Low-rent housing projects within the School City have significantly affected the racial composition of the schools." *United States* v. *Board of School Commissioners,* 332 F. Supp. 655, 673 (S. D. Ind. 1971). He reaffirmed this in his most recent decision, "The location of these housing projects by instrumentalities of the State of Indiana has obviously tended to cause and to perpetuate the segregation of black pupils in IPS territory." The record supports these findings and clearly shows a "purposeful, racially discriminatory use of state housing." *Milliken* v. *Bradley,* 418 U. S. 717, 755 (1974) (Stewart, J., concurring). The Government's statement in its brief supports this view:

> Given that a disproportionate number of blacks are both in low income categories and were already concentrated in IPS and considering the predominantly black composition of the pool of applicants for the H.A.C.I. low-income housing projects, it is a reasonable inference that this action

would and did have a further impact upon the racial compositions of schools and school districts in Marion County.

The Housing Authority contends the district court had no authority to enjoin it from building additional public housing within IPS and from renovating Lockefield Gardens for other than the elderly because the court could not lawfully find a constitutional violation by HACI in confining its housing projects to IPS territory. The evidence presented above, however, is to the contrary.

By locating its projects within IPS and in many cases near all black neighborhoods, the Housing Authority significantly contributed to the disparity in residential and school populations between the inner city and the suburbs. Its acts produced discriminatory effects both within IPS and the suburbs. The relief ordered by the district court was directed to correcting the effects of those past discriminatory acts. Accordingly, the district court did not abuse its discretion in enjoining the Housing Authority from building additional projects within IPS. That part of the injunction that relates to Lockefield Gardens was also proper since permitting it to be used for family housing, where school children are undoubtedly involved, would only further aggravate the school segregation problem.

V.

The Government contends that the mandatory transfer of students between IPS and the suburban schools ordered by the district court is improper. After conceding the import of *Milliken,* the propriety of interdistrict relief, and noting the specific finding of facts found by the district court to have substantially caused segregation in the other districts, the Government concludes the district court's order was an abuse of discretion. We are confused by the Government's reasoning. We fail to see how the district court abused its discretion when it was clearly acting within the guidelines of *Milliken.* It was not an abuse of dis-

cretion merely because the Government would have preferred another remedy.

Furthermore, the Government's arguments are inconsistent. On the one hand, it demands that segregation be eliminated root and branch from within IPS; on the other, it condemns the only relief which can make its demand a reality. We are surprised the Government seriously offers voluntary transfer as an alternative to mandatory transfer as a means to effectuate its goal of complete desegregation. History has taught us that "freedom of choice" plans produce negligible results. *Green* v. *County School Board,* 391 U. S. 430 (1967).

Even if we were to agree with the Government that voluntary transfers are desirable, Indiana law provides no secure mechanism for achieving this result. The Government suggests that voluntary transfers can be made in accordance with Acts 1973, P. L. § 1; I. C. 1971, 20-8.1-6-1, Burns Ind. Stat. Ann. § 28-5001 (1971), which permits transfers under certain conditions.[11] We do not agree, however, that this law is sufficient to provide for the kind of transfers the district court ordered. The language in the statute is permissive and vague (a transfer *may* be granted if the school corporation feels a child may be better accommodated in another school) and does not contemplate transfers for desegregation purposes. We could hardly believe we

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11. The statute provides:

> Transfer—General order.—The governing body of any school corporation may grant an order of transfer upon proper application by the parent of any child who resides in that corporation if it feels the child may be better accommodated in the public schools of another school corporation of this state or of an adjoining state. In determining whether a child can be better accommodated, such matters as the proximity of the schools to the residence of the child desiring the transfer, the kind and character of the roads, the means of transportation, and the crowded conditions of the school shall all be pertinent. If there is no high school in the school corporation in which a child resides, the governing body shall grant an order of transfer. When a transfer is granted under this section, transfer tuition shall be paid as provided in this chapter.

were carrying out our duty to dismantle segregation root and branch if we were to choose this law to accomplish our goal.

The limited interdistrict remedy ordered by the district court is supported by the record and in accord [*sic*] the legal principles enunciated in *Milliken.*

In affirming the district court's order, we suggest that the court monitor the transferance of black pupils from IPS to the other school districts periodically, perhaps on a yearly basis, in order that modifications, if necessary, may be made. This is in the hope that segregation and discrimination will be completely eradicated within IPS in furtherance of the goal of equal opportunity proclaimed two hundred years ago in the Declaration of Independence.[12]

AFFIRMED.

Tone, *Circuit Judge,* dissenting.* There are only two possible interdistrict constitutional violations, in view of our decision on the second appeal, *United States* v. *Board of School Commissioners,* 503 F. 2d 68 (7th Cir. 1974), *cert. denied,* 421 U. S. 929 (1975), as the majority recognizes. These two possibilities are Uni-Gov and the Housing Authority's location of public housing, as to both of which the District Court heard evidence and made findings on remand.

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12. Supplementing Judge Tone's footnotes to his dissent, the author of this opinion acknowledges extensive borrowing from Judge Tone's original draft of an opinion, particularly with respect to the factual background of this case. That use made my task easier, and I am indeed grateful.

* The writing of the court's opinion was initially assigned to me, my tentative vote at conference having been to affirm. After I had devoted much time toward the preparation of an opinion, I came to the view reflected in this dissent. The writing of the court's opinion was therefore reassigned to Judge Swygert, who was already burdened with his share of the work of the Seventh Circuit but nevertheless had to find time for this case. While the results of my work on the record, which I made available to him, were I hope of some use in connection with the writing of his opinion, he got a very late start because of the circumstances just described. I recite this intramural history to record the reason for the unusual delay between oral argument and decision and the fact that Judge Swygert is not responsible for that delay.

Whether these state actions violated the Equal Protection Clause depends upon the existence of a racially discriminatory purpose. Disproportionate effect on minorities without discriminatory purpose is not enough. If this was not clear after *James* v. *Valtierra*, 402 U. S. 137 (1971), *Jefferson* v. *Hackney*, 406 U. S. 535, 548-549 (1972), and *Keyes* v. *School District No. 1*, 413 U. S. 189, 208 (1973), it was made so by *Washington* v. *Davis*, 44 U. S. L. W. 4789 (U. S., June 7, 1976). The Court squarely held in the latter case that equal protection is denied only when the state acts with a racially disciminatory purpose:

> "[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact. [Original emphasis.]
>
> * * * * *
>
> "The school desegregation cases have . . . adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause.
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> * * * * *
>
> ". . . Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution." 44 U. S. L. W. at 4792, 4793.

The record before us does not contain findings or evidence that the state acted with a racially discriminatory purpose in connection with Uni-Gov or public housing siting.[1] An essential element of an equal protection violation is therefore missing.

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1. The criterion of racially discriminatory purpose is, of course, often not easy to apply. Even if, in any given case, a body such as a legislature or school board can be said to have a collective intent (see R. Dickerson, *The Interpretation and Application of Statutes* 67,

(Footnote continued on next page.)

One other governing principle should be noted at the outset. *Miliken* v. *Bradley*, 418 U. S. 717 (1974), in language we are not free to ignore, focused on the constitutional right to be vindicated. Amplifying the statement quoted by the majority that "the scope of the remedy is determined by the nature and extent of the constitutional violation," *id.* at 744, the Supreme Court said two pages later:

> "Disparate treatment of white and Negro students occurred within the Detroit school system, and not elsewhere, and on this record the remedy must be limited to that system.
> . . .
>
> "The constitutional right of the Negro respondents residing in Detroit is to attend a unitary school system in that district. Unless petitioners drew the district lines in a discriminatory fashion, or arranged for white students residing in the Detroit District to attend schools in Oakland and Macomb Counties, they were under no constitutional duty to make provisions for Negro students to do so. The view of the dissenters, that the existence of a dual system in Detroit can be made the basis for a decree requiring cross-district transportation of pupils, cannot be supported on the grounds that it represents merely the devising of a suitably flexible remedy for the violation of rights already established by our prior decisions. It can be supported only by drastic expansion of the constitutional right itself, an expansion without any support in either

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(Footnote continued from preceding page.)

et seq. (1975)), that intent is often difficult to ascertain. See Justice Powell's concurrence in *Keyes*, 413 U. S. at 217, 233-234. For this reason Justice Stevens, concurring in *Washington* v. *Davis*, observed that "the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume," and based his concurring vote, in a manner reminiscent of Justice Harlan's concurring opinion in *Hunter* v. *Erickson*, 393 U. S. 385, 393 (1969), on the objective indicia that the governmental action was grounded on neutral principle. In the case at bar, this problem is not as knotty as it often is. Uni-Gov satisfies the neutral principle standard, and the search for collective legislative intent, which able counsel must have made, seems to have turned up no evidence whatsoever of racially discriminatory purpose on the part of anyone responsible for the legislation. The housing siting decisions are in a similar posture.

> constitutional principle or precedent." *Id.* at 746-747 (footnote omitted).

That *Milliken* controls here, apart from the additional evidence on Uni-Gov and public housing, was of course recognized in our decision on the second appeal, in which we reversed the portion of the District Court's order calling for interdistrict relief outside the Uni-Gov. territory. That decision was a recognition that, in the language of *Milliken,* "[t]he constitutional right of the Negro respondents residing in [IPS] is to attend a unitary school system in that district," *id.,* and an interdistrict remedy is not an appropriate means of vindicating that right. The question now is: What other constitutional rights, violation of which calls for an interdistrict remedy, were shown on remand to have been violated by Uni-Gov and the siting of public housing projects? The majority does not seem to me to answer that question.

The District Court did not find that the legislative decision to exclude IPS from Uni-Gov was racially motivated.[2] The record would not have supported such a finding in view of both the absence of any direct evidence of such a motivation and the presence of such evidence as the historic context of opposition to county-wide school consolidation on non-racial grounds,[3] the

2. Such a finding cannot be inferred from the District Court's statement that by not consolidating the schools under Uni-Gov, the General Assembly "signaled its lack of concern with the whole problem and thus inhibited desegregation with[in] IPS." Apart from doubt about whether there is any evidence that Uni-Gov had an inhibiting effect on desegregation, as distinguished from not promoting desegregation, the court has merely described an effect and not a purpose. A "lack of concern" does not amount to a racially discriminatory purpose. The state, like Michigan in *Milliken,* was under no direct constitutional duty to adopt interdistrict measures, and a duty to act could hardly arise from the fact that failure to act would "signal a lack of concern."

3. There is no evidence, as the majority recognizes, that the opposition to consolidation of Marion County School districts under the Indiana School Reorganization Act of 1959 (Ind. Code § 20-4-1-1, *et seq.*), was racially motivated. Nor is there any evidence that the failure to consolidate after that time or opposition to civil

(Footnote continued on next page.)

decision to leave other government units out of Uni-Gov,[4] the fact that all school boundaries elsewhere in the state were already frozen, and the non-racial reasons and the haphazard fashion in which civil annexation had taken place in the past, which had done nothing to establish rational school boundaries.[5] The appellees do not argue that the evidence shows a racially discriminatory purpose. In their briefs, filed before the decision in *Washington* v. *Davis,* the government assumes, and the intervening plaintiffs argue, that such a purpose need not be shown.

(Footnote continued from preceding page.)
annexation was racially motivated. The District Court, in the course of the hearing on remand after our decision on the second appeal, spoke of the purpose of certain exhibits as being offered "to prove or tend to prove that the present division of Marion County into eleven separate school districts is something that happened because of reasons pertaining primarily to school finances as well as to the desire of non-IPS schools to maintain local autonomy rather than for reasons of separating students based on race. . . . I presume that if the Government or the intervening plaintiffs had some evidence to the contrary that they would be cross-examining, or examining along those lines." [March 1975 Tr., Vol. III, pp. 359-360.] Neither the government nor the intervening plaintiffs offered any "evidence to the contrary" or cross-examined along the lines referred to.

4. Among those other governmental units were the Airport Authority, the Health and Hospital Corporation, the County Department of Welfare, the Building Authority, and the Library Districts. See Ind. Code § 18-4-3-14. The so-called "excluded cities" of Speedway, Perry and Lawrence [sic] retained their own local governments, which provide municipal services in those areas, although Uni-Gov has the responsibility even in those areas for air pollution regulation, building code enforcement, municipal planning, and thoroughfare control.

5. The record indicates that the reasons for this and the resulting irregularities in the boundaries of Indianapolis were that in many instances residents protested annexation because they felt the city would not provide them with services commensurate with the additional tax money they would be paying (not an uncommon reason for opposition to annexation by municipalities large and small throughout the country), and in other instances commercial developers sought and gained the annexation of land they owned because they wanted benefits that could be obtained through annexation. Thus whether this land was annexed depended in large part upon the position taken by the owners of the land affected. [March 1976 Tr., Vol. II, pp. 219-220.]

A search in the opinion of this court's majority for a finding of racially discriminatory purpose will be unproductive. The majority finds (text at notes 9 and 10) that the General Assembly did not want IPS boundaries to expand with the city boundaries whether or not Uni-Gov was adopted[6] but does not follow with a statement that this desire or the actions effectuating it were racially motivated. Instead it goes on to state, citing *Milliken,* that "Uni-Gov and its companion 1969 legislation were 'a substantial cause of interdistrict segregation'. . . and 'contributed to the separation of the races by . . . redrawing school lines. . . .'"[7] But under *Milliken,* as explained in *Washington* v. *Davis,* cause and effect are not enough. A racially discriminatory purpose is necessary. The closest the majority comes to finding a racially discriminatory purpose is in the abstract statement, at the end of the paragraph containing the three hypotheticals, that "a city should not be permitted to extend its boundaries in order to avoid desegregation." I believe that if this court intended to find as a fact that Uni-Gov was adopted with a racially discriminatory purpose, in the face of the failure of the District Court to find, and of the appellees to argue, that there was such a purpose, it would do so directly and state the evidentiary basis for that finding. As stated above, I believe there is no such basis in the record.

The majority attempts to avoid the necessity of finding discriminatory purpose by postulating an affirmative duty to

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6. This inference is drawn from the adoption of Chapter 52, 1969 Acts (Ind. Code § 20-3-14-9) seven days before the adoption of Uni-Gov and the adoption of Chapter 239, 1969 Acts (Ind. Code § 18-5-10-25). The effect of these two acts was to eliminate the automatic expansion of IPS boundaries to match the expansion of city boundaries and to limit remonstrances against annexations. These acts were rendered nugatory by the adoption of Uni-Gov.

7. Failing to redraw the school district lines does not seem to me to be "redrawing school district lines," but this is not important to an analysis of the problem, because the controlling question is whether, however the legislature's action is described, it was taken with a racially discriminatory purpose.

desegregate under *Green* v. *County School Board*, 391 U. S. 430 (1968), and the Indiana statutes. It is doubful that the Indiana legislature could impose on itself by statute the duty to pass additional statutes, and, if it could, violation of such a duty would not give rise to a federal constitutional claim. *Milliken's* teaching is that the state's constitutional duty under *Green* is commensurate with the violation, which, apart from the Uni-Gov events themselves, was a violation of the right to attend a unitary school system within IPS. Under *Milliken*, there can be no affirmative duty to use interdistrict means to remedy intradistrict violations; for if such a duty existed, the State of Michigan surely violated it in that case, which would have mandated the interdistrict remedy rejected by the Supreme Court, and there was no reason in the case at bar to exclude the territory outside Uni-Gov from the scope of our remand on the second appeal.

Evans v. *Buchanan*, 393 F. Supp. 428 (D. Del. 1975), *aff'd*, 96 S. Ct. 381 (1975), on which the majority relies, does not in my opinion support affirmance. That case, unlike the case at bar, involved a prior interdistrict violation mandating the adoption of interdistrict measures by state authorities. The district court opinion in *Evans* shows *de jure* segregation before *Brown* v. *Board of Education*, 347 U. S. 483 (1954), was practiced on an interdistrict basis in the Wilmington area. 393 F. Supp. at 437. The state failed to carry its burden of showing that these past acts of segregation had become so attenuated that "the current segregation is in no way the result of those past segregation actions," *Keyes* v. *School District No. 1*, *supra*, 413 U. S. at 211, n. 17; in fact, post-*Brown* acts contributed to continued interdistrict segregation, see 393 F. Supp. at 434-436. Consequently, there was an affirmative duty to remedy the interdistrict violation, and the Delaware reorganization statute, by barring consolidation as a way of doing so, "contravene[d] the implicit command of *Green* v. *County School Board* . . . that all reasonable methods be available to formulate an effective

remedy." *North Carolina State Board of Education* v. *Swann,* 402 U. S. 43, 46 (1971).

The majority relies on the "racial impact" theory espoused by the district court in *Evans.* The summary affirmance of the three-judge district court's judgment does not necessarily imply approval of that court's reasoning, and that reasoning clearly cannot stand after *Washington* v. *Davis.*

In short, there is no finding and no evidence that the exclusion of IPS from Uni-Gov was racially motivated, and by all objective criteria Uni-Gov was racially neutral state action. Uni-Gov left untouched the boundaries of IPS, which had been established for racially neutral reasons. The changes in civil boundaries and reallocations of civil governmental functions made by Uni-Gov had no effect on the constitutional rights of school children in IPS.

Public Housing

The District Court, while unconvinced by the reasons given for the selection by the Housing Authority of certain sites near the periphery of the City of Indianapolis, made no findings that any of the Housing Authority's decisions were racially motivated. As the majority notes, under federal statute (42 U. S. C. § 1415(7)(b)(i)) and HUD guidelines, the Housing Authority could not obtain federal funds for a project in the absence of a cooperation agreement with the local governmental authority obligating the latter to provide essential governmental services; and as the District Court found, "Suburban Marion County officials have refused to cooperate with HUD on the location of such projects." It is apparent from the record and the District Court's findings that this was real reason housing projects were built only within the City of Indianapolis before the effective date of Uni-Gov. There was no finding and no evidence that the refusals were racially motivated. Failure of local authorities to enter into these agreements, without more, does not give rise to an inference of racially discriminatory purpose, even though

the projects are to be occupied by large numbers of blacks. See *James* v. *Valtierra, supra,* 402 U. S. at 141; see also *Metropolitan Housing Development Corp.* v. *Village of Arlington Heights,* 517 F. 2d 409, 412-413 (7th Cir. 1975), *cert. granted,* 96 S. Ct. 560 (1975). As these cases hold, the state's location of low-rent housing projects for racially neutral reasons, even though it has a disparate effect on minority groups is not subject to strict scrutiny. *James* v. *Valtierra, supra,* 402 U. S. at 141; *Metropolitan Housing Development Corp.* v. *Village of Arlington Heights, supra,* 517 F. 2d at 413.[8] As the majority notes, the record is silent as to why no housing projects were commenced within IPS since the effective date of Uni-Gov. Absent a showing of discriminatory intent, I find no ground on which to sustain the injunction against the Housing Authority.

Relief

In the absence of an interdistrict violation, there should be no interdistrict relief against the school corporation defendants. If I believe, the majority were correct in finding interdistrict violations, I would agree that the remedy ordered by the District Court is within its discretion and would not have this court sub-

8. The majority does not rely on other acts of the state and private parties that had the effect of confining blacks to the IPS area, to which the brief of the United States refers. These acts which include recording racial covenants, discriminatory FHA loan practices and private discrimination by brokers, sellers, and others, were referred to by the District Court as "customs and usages of both the officials and inhabitants of such areas" which "discourage[d] blacks from seeking to purchase or rent homes therein, all as shown in detail in previous opinions of this Court." While the District Court was no doubt correct in this statement, the findings referred to and the evidence supporting it were all in the record at the time of the last appeal, when we held that *Milliken* precluded relief outside Marion County, and are similar to findings and evidence in *Milliken.* See 418 U. S. at 724, 728 n. 7. If these facts had sufficed to justify an interdistrict remedy, the Supreme Court in *Milliken* would presumably either have affirmed on the familiar principle that a reviewing court will affirm on any basis supported by the record, even if not relied on by the lower court, or else would have remanded for further consideration of the housing issue. See, *e.g., Dandridge* v. *Williams,* 397 U. S. 471, 475 n. 6 (1970).

stitute its discretionary judgment for that of the District Court by ordering only the voluntary-transfer remedy urged by the government. In this connection, I do note that even when no constitutional violation has occurred, Indiana law provides relief to a student who is prevented by school district lines from attending the school nearest his home, Ind. Code § 20-8.1-6-1, *et seq.*, and the school authorities seem to be obligated to grant such relief. *State ex rel. Smitherman* v. *Davis,* 283 Ind. 563, 571, 151 N. E. 2d 495, 498 (1958).

I further believe that since the Housing Authority, unlike HUD in *Hills* v. *Gautreaux,* 44 U. S. L. W. 4480 (U. S. April 20, 1976), has not been found to have engaged in purposefully discriminatory and therefore unconstitutional conduct, no relief against that agency is warranted.

UNITED STATES DISTRICT COURT,
Southern District of Indiana,
Indianapolis Division.[3]

UNITED STATES OF AMERICA,

Plaintiff,

DONNY BRURELL BUCKLEY, ALYCIA MARQUESE BUCKLEY, by their parent and next friend, Ruby L. Buckley, on behalf of themselves and all Negro school age children residing in the area served by original defendants herein,

Intervening Plaintiffs,

vs.

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA; KARL R. KALP, as Superintendent of Schools; MARTHA MCCARDLE, as President of The Board of School Commissioners; WILLIAM M. S. MYERS, CARL J. MEYER, PAUL E. LEWIS, LESTER E. NEAL, CONSTANCE R. VALDEZ, W. FRED RATCLIFF, Members of The Board of School Commissioners of the City of Indianapolis,

Defendants,

OTIS R. BOWEN, as Governor of the State of Indiana; THEODORE SENDAK, as Attorney General of the State of Indiana; HAROLD H. NEGLEY, as Superintendent of Public Instruction of the State of Indiana; THE METROPOLITAN SCHOOL DISTRICT OF DECATUR TOWNSHIP, MARION COUNTY, INDIANA; THE FRANKLIN TOWNSHIP COMMUNITY SCHOOL CORPORATION, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF LAWRENCE TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF PIKE TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF WARREN TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF WASHINGTON TOWNSHIP, MARION

(Caption continued on next page.)

3. Reported at 419 F. Supp. 180.

(Caption continued from preceding page.)

COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF WAYNE TOWNSHIP, MARION COUNTY, INDIANA; SCHOOL CITY OF BEECH GROVE, MARION COUNTY, INDIANA; SCHOOL TOWN OF SPEEDWAY, MARION COUNTY, INDIANA; THE METROPOLITAN DEVELOPMENT COMMISSION OF MARION COUNTY; THE HOUSING AUTHORITY OF THE CITY OF INDIANAPOLIS; THE INDIANA STATE BOARD OF EDUCATION, a public corporate body:

Added Defendants,

CITIZENS FOR QUALITY SCHOOLS, INC.;

Intervening Defendant,

COALITION FOR INTEGRATED EDUCATION;

Amicus Curiae.

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA,

Cross-Claimants,

vs.

THE METROPOLITAN DEVELOPMENT COMMISSION OF MARION COUNTY; THE HOUSING AUTHORITY OF THE CITY OF INDIANAPOLIS,

Cross-Defendants.

MEMORANDUM OF DECISION.

This case comes before the Court for further hearing, pursuant to the direction of the Court of Appeals for the Seventh Circuit. 503 F. 2d 68 (1974) cert. den. ..... U. S. ....., 43 USLW 3571 (April 21, 1975). The previous history of the case, and of various related actions, is fully set out at 503 F. 2d 71-75, and will not be repeated here. The names of certain defendants sued in a representative capacity, and whose terms have expired, have been deleted and their successors substituted.

This Court was specifically directed to determine whether the establishment of the Uni-Gov boundaries of the City of Indianap-

olis[1] without a like re-establishment of Indianapolis Public Schools boundaries warrants an interdistrict remedy within Uni-Gov in accordance with *Milliken* v. *Bradley,* 418 U. S. 717, 94 S. Ct. 3112, 41 L. Ed. 2d 1069 (1974). Pursuant to such direction, a further evidentiary hearing was held, beginning March 18, 1975, and the parties have submitted both oral argument and briefs, all of which have been considered. The Court has also given consideration to other matters raised by the pleadings and evidence, and to matters of Indiana Law, all as will more fully appear.

The defendant Board of School Commissioners (IPS) on September 29, 1971, brought into the case as additional defendants, The Metropolitan Development Commission of Marion County (Commission) and The Housing Authority of the City of Indianapolis (HACI), and by way of a cross-complaint charged them with implementing policies which contributed to the segregation of IPS. Declaratory relief was demanded. These issues were not taken up heretofore, but in its pretrial entry of December 13, 1974 the Court ruled that, in addition to the Uni-Gov issue, the issue of the effect, if any, of the housing and zoning laws, rules, regulations and customs in Marion County, Indiana and its various political subdivisions upon the de jure segregation of IPS, would be considered. The greater part of the evidence introduced at the March hearing was on the latter subject.

The issue regarding housing and zoning laws was not mooted by *Milliken.* To the contrary, the concurring opinion of Mr. Justice Stewart, which constituted the decisive vote as between an otherwise evenly balanced Court, stated, "Were it to be shown

1. The boundaries of the city, pursuant to Uni-Gov, are coextensive with the boundaries of Marion County, except that the cities of Beech Grove and Lawrence ("excluded cities") and the unincorporated town of Speedway ("excluded town") are permitted to carry on as separate municipal corporations within the territory of the consolidated City of Indianapolis. Citizens of these communities have a dual status—for example, a Beech Grove voter may vote for Mayor of Indianapolis, members at large of the City County Council, Mayor of Beech Grove, and city councilmen of Beech Grove.

. . . that state officials had contributed to the separation of the races by drawing or redrawing school district lines . . .; or by purposeful, racially discriminatory use of state housing or zoning laws, then a decree calling for transfer of pupils across district lines or for restructuring of district lines might well be appropriate." 418 U. S. at 755.

The evidence is undisputed that each and every public housing project constructed and operated by the added defendant HACI is located within IPS territory, in some instances just across the street from territory served by one of the added defendant school corporations. Each of such locations was approved—in some instances selected in the first place—by the added defendant Commission. The latter institution has had county-wide zoning jurisdiction at all times during the construction of 10 out of the 11 public housing projects for families, and HACI has at all times had the authority to erect public housing within the City of Indianapolis, and within five miles of the corporate limits of such city. The residents of said public housing projects are approximately 98% black (except in projects for the elderly), and their children all attend school in IPS. The location of these housing projects by instrumentalities of the State of Indiana has obviously tended to cause and to perpetuate the segregation of black pupils in IPS territory.

The evidence in the record, as taken in all hearings, clearly shows that the Suburban Marion County units of government, including the added defendant school corporations, have consistently resisted the movement of black citizens or black pupils into their territory. They have resisted school consolidation, they resisted civil annexation so long as civil annexation carried school annexation with it, they ceased resisting civil annexation only when the Uni-Gov act made it clear that the schools would not be involved. Suburban Marion County has resisted the erection of public housing projects outside IPS territory, suburban Marion County officials have refused to cooperate with HUD on the location of such projects, and the customs and usages of both

the officials and inhabitants of such areas has been to discourage blacks from seeking to purchase or rent homes therein, all as shown in detail in previous opinions of this Court.

In its most recent opinion, 503 F. 2d at 80, the Court of Appeals specifically concluded, with this Court, that state officials of the State of Indiana "have, by various acts and omissions, promoted segregation and inhibited desegregation within IPS, so that the state, as the agency ultimately charged under Indiana law with the operation of the public schools, has an affirmative duty to assist the IPS Board in desegregating IPS within its boundaries. . . ." Inasmuch as certiorari has been denied by the Supreme Court, the finding that the State has promoted segregation and inhibited desegregation within IPS is, quite obviously, the law of the case. The new findings of this Court that the Commission and HACI have been guilty of such acts simply amplifies such earlier findings. The action of these agencies in confining poor blacks to the inner city has directly and proximately contributed to cause the suburban school districts within Marion County, other than Washington Township and Pike Township, to be and remain segregated white schools, with segregated white facilities and administrative staffs.

The evidence clearly shows that at the time of the passage of the Uni-Gov Act in 1969, various annexation plans and school consolidation plans had bogged down on the local level because of the aforementioned opposition of the suburban school corporations within Marion County, and their patrons. However, the General Assembly of Indiana, with its members elected on a state-wide basis, was not, or should not have been, subservient to local pressures, and undoubtedly could have legislated a county-wide school system for Marion County as easily as it legislated a county-wide civil government. Under existing law, both Federal as expressed in *Brown* v. *Board of Education*, 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955), and in *Green* v. *County School Board*, 391 U. S. 430, 88 S. Ct. 1689, 20 L. Ed. 2d 716 (1968), and the law of Indiana as expressed in

Acts 1949, Ch. 186, p. 603, Burns Ind. Stat. Ann. §§ 28-6106-28-6112 (1970), it had a duty to alleviate the segregated condition then existing in IPS. When the General Assembly expressly eliminated the schools from consideration under Uni-Gov, it signaled its lack of concern with the whole problem and thus inhibited desegregation with [*sic*] IPS.

The Court finds that the establishment of the Uni-Gov boundaries without a like re-establishment of IPS boundaries, given all of the other facts and circumstances set out in this and former opinions of this Court, warrants a limited inter-district remedy within all of Marion County, Indiana, as hereafter described.

Recently, the General Assembly has taken some steps to meet its duty under the law—specifically by passing P. L. 94 of the Acts of 1974, Burns Ind. Stat. Ann. §§ 28-5031-28-5040, I. C. 1971, 20.-8.1-6.5-1, et seq., as added 1974. The Court of Appeals in its opinion at 503 F. 2d 74 refers to this statute as "rigidly limited in its application," which may well be, but in any event it does expressly recognize the power both of United States district courts and of the courts of the State to make orders regarding the transfer of pupils from one school corporation to another if certain conditions be found to exist, and affords a State policy and means for paying the costs of such inter-district relief, all of which was lacking in *Milliken.*

Specifically, the statute provides a means and method whereby a transferor school corporation may pay a transferee school corporation for the cost of education of a pupil transferred from the one to the other in compliance with a court order issued under the following conditions:

(1) In a suit where the transferor or transferee corporation or corporations are parties, the Court must have found the following:

(a) A transferor corporation has violated the equal protection clause of the Fourteenth Amendment to the

Constitution of the United States by practicing de jure racial segregation of the students within its borders;

(b) A unitary school system within the meaning of such amendment cannot be implemented within the boundaries of the transferor corporation; and

(c) The Fourteenth Amendment compels the Court to order a transferor corporation to transfer its students for education to one or more transferee corporations to effect a plan of desegregation in the transferor corporation which is acceptable within the meaning of such amendment.

In the case at hand, we have a suit in which all of the school corporations in Marion County, Indiana are parties, and in which this Court has made, and now reiterates, the following findings:

(a) The defendant Board of School Commissioners of Indianapolis, Indiana (IPS) has violated the equal protection clause of the Fourteenth Amendment to the Constitution of the United States by practicing de jure racial segregation of the students within its borders. *United States* v. *Board of Sch. Com'rs, Indianapolis, Ind.*, 332 F. Supp. 655 (S. D. Ind. 1971), aff'd 474 F. 2d 81 (7 Cir.), cert. den. 413 U. S. 920, 93 S. Ct. 3066, 37 L. Ed. 2d 1041 (1973).

(b) A unitary school system within the meaning of such amendment cannot be implemented within the boundaries of IPS. "In the long haul, it won't work." 332 F. Supp. at 678.

This Court found as a fact in its opinion of July 20, 1973, 368 F. Supp. 1197, et seq., that within the IPS boundaries resegregation of desegregated schools occurs when the percentage of black students in a given school approaches 25% to 30%, more or less. That finding has not been challenged by anyone. Therefore, in a school corporation in which the percentage of black pupils has now reached more than 42% over all, and with the Court of Appeals having ordered this Court to take further steps to desegregate the same, 503 F. 2d 80,

the Court is placed in an impossible situation unless the transfer for education of a substantial number of black IPS pupils to school corporations other than IPS is accomplished.

The Court therefore makes the following additional finding:

(c) The Fourteenth Amendment compels the Court to order IPS to transfer a substantial number of its black students to various added defendant school corporations for education in order to effect a plan of desegregation in the transferor corporation which is acceptable within the meaning of such amendment.

The Court of Appeals has called the attention of this Court to the rule of law that "white flight" is not an acceptable reason for failing to dismantle a dual school system. 503 F. 2d 80, citing *United States* v. *Scotland Neck City Board of Education,* 407 U. S. 484, 491, 92 S. Ct. 2214, 2218, 33 L. Ed. 2d 75 (1970). However, it does not follow that this Court must ignore the probability of white flight in attempting to formulate guidelines for IPS to follow in accomplishing the final desegregation of its schools. In other words, as this Court sees it, white flight may not be used as an excuse for inaction; it may, however, supply the reason for a particular kind of action.

This approach requires the Court, once again, to review applicable statistics. "The Constitution does not compel any particular degree of racial balance or mixing, but when past and continuing constitutional violations are found, some ratios are likely to be useful starting points in shaping a remedy . . ." *Notrh Carolina Bd. of Ed* v. *Swann,* 402 U. S. 43, 91 S. Ct. 1284, 28 L. Ed 586 2d (1971).

For the school year 1974-75, there were 77,732 pupils enrolled in IPS, excluding kindergarten and special education students. Of these 44,756, or 57.57%, were white and 32,976, or 42.43%, were black. Virtually all schools had an enrollment of at least 15% black pupils, and 19 elementary schools and one high school had enrollments in excess of 80% black. As

the Court understands the order of the Court of Appeals, this group of 20 schools must be further desegregated. As stated above, this Court has previously found that to require all schools to enroll about 42.43% black pupils would immediately accelerate white flight and unbalance the entire system beyond saving. The Court respectfully declines to stultify itself by giving any such direction.

The Metropolitan School Districts of Washington Township and Pike Township are integrating rather rapidly, as a result of demographic changes, so that Washington had a black percentage of approximately 15% and Pike a black percentage of approximately 12% for the past school year. These percentages seem likely to increase for the coming year. If the percentage of black students in the other suburban districts within Marion County were equivalent to that of Washington Township, approximately 9,525 black students would need to be transferred to such districts. The Court finds that the Fourteenth Amendment compels it to order IPS to transfer, and for the added defendant school corporations, other than Pike and Washington, to receive approximately such number of black students, over a period of time, in order to effect a plan of desegregation within IPS which is acceptable within the meaning of such amendment.

Transfers shall not include kindergarten nor special education students, and such students shall not be counted for the purpose of determining the number of transferees to each school corporation. Further, for the school year 1975-76, transfers will be limited to students in grades 1-9, inclusive, for a total of about 6,533 students, with the understanding that a student once transferred to a suburban school corporation will continue in such corporation until graduation from high school, unless the residence of such student is moved from IPS.

The number of students to be transferred to a particular school corporation shall be in such number as to cause the total enrollment of pupils in such school corporation, after the

transfers have been accomplished, to be approximately 15% black. As an example, Beech Grove City Schools for the school year 1974-75 had an all white enrollment of 1,865 in grades 1-9, excluding special education. The 1,865 should be 85% of the school population after transfer; therefore 1% would be 21.9411, and 15% would be 15 x 21.9411 or 329. Approximately 329 black students would be transferred from IPS to Beech Grove in grades 1-9 for the coming school year. For the ensuing years, the original transferees would continue in the Beech Grove schools, and a new first grade group in an appropriate number would be transferred. Transfers by grade should be proportionate to the number of students enrolled per grade in the transferee schools for the past school year. Fortunately, the reports on classroom space filed by the added defendants reflects that, without exception, there is ample space available in which to house the transferees; also, IPS has ample transportation facilities available.

It is possible that transfers of black students to Washington Township should be made for education at the J. Everett Light Career Center; ruling on this point is reserved pending clarification as to certain statistical information in the record.

With regard to the present transfer of pupils, as above described and as will be more particularly set out in an accompanying order and judgment, the respective superintendents of the transferee school corporations involved, or their nominees, are directed to meet with the superintendent of IPS, or his nominees, forthwith in order to work out the exact names, numbers, and grades of pupils to be transferred. Reasonable deviations from exact statistical scheduling are anticipated, and may be agreed upon, subject to the approval of the Court. Disagreements, if any, shall be promptly referred to the Court for resolution. The transfers shall be effective, and transfer of pupils shall begin on the first day of the 1975-76 school year at each of the various transferee schools.

Once the transfer pupils have been identified, the defendant IPS is directed to submit to the Court a final plan for desegregation of the remaining schools within IPS. Alternate plans may be submitted, in the discretion of IPS. Such plan or plans shall consider the high schools, as well as elementary schools. Kindergarten students and special education students need not be taken into account in computing black-white ratios in the various schools. Such plan or plans shall be submitted on or before October 15, 1975 and, if one be approved, it shall be put into effect at the beginning of the second semester of the 1975-76 school year, except as the Court may otherwise order.

As previously found, the location by HACI of all of its public housing facilities within IPS territory has had a major influence toward keeping black students confined within IPS, while at the same time keeping the suburban school systems virtually all white. Such conduct should and will be enjoined, so as to prohibit HACI from locating any additional public housing units within the boundaries of IPS. Furthermore, HACI should and will be enjoined from reopening Lockefield Gardens, a public housing project which is now vacant, to tenants other than the elderly.

The case for the intervening Buckley plaintiffs and their class was filed and has been presented by John O. Moss and John Preston Ward. The Court previously found them entitled to recover their reasonable attorneys fees and expenses, pursuant to 20 U. S. C. § 1617, but no fees have as yet been awarded, and the Court of Appeals has requested a further finding on the issue. 503 F. 2d 86. It is the Court's opinion that the Buckley plaintiffs should be regarded as the "prevailing parties," within the meaning of such statute, if the rulings of this Court relating to transfer of pupils become final, since they

are the only parties who have contended for a remedy going beyond the IPS strait jacket.

Orders will be entered in accordance with this memorandum.

Dated this 1st day of August, 1975.

/s/ S. HUGH DILLIN,
S. Hugh Dillin,
Judge.

Article XIII—Department of Parks and Recreation.

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Article XIV—Finances.

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Article XV—General Provisions.

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[4]INDIANA ACTS, 1969, CHAPTER 239 (Civil Annexation Statute) [H. 1006. Approved March 14, 1969.]

AN ACT relating to cities and towns; their common powers; annexation of territory; additions, plats, and repealing certain laws.

Be it enacted by the General Assembly of the State of Indiana:

ARTICLE 1. Definitions and Citation Reference.

SECTION 101. This act may be cited and referred to as the City and Town Act of 1969.

* * * * *

Article III. Union of Cities and Towns.

SEC. 301. Where a city and a town, or two (2) cities, or two (2) towns, adjoin each other, they may be united provided a majority of the qualified voters voting on the question of union, in each of the adjoining corporations shall vote in favor of the union. The common council of the city and the board of

4. Codified in its current amended form as IC 18-5-10.

trustees of the town, or the common councils of the cities, or the boards of trustees of the towns, as the case may be, shall, by resolution, passed by each council or board, first agree on the terms upon which the union shall take place, including the name by which the united corporation shall be known, and the day upon which an election for the purpose shall be held in each of the adjoining municipalities.

Notice of the agreement shall be given at least twenty (20) days before the time fixed for the election, by publication of the same for two (2) weeks successively, once each week, in each of the corporations as the publication requirements of Chapter 96, Acts of 1927, as amended, applies to each of them.

The elections shall be held in the voting precincts of each of the corporations, as other city and town elections are held. The ballots for the election shall have thereon the words "Yes" and "No," and those electors favoring the agreement shall vote "Yes" and those opposed, "No"; and the election boards shall report to their respective common councils or boards of trustees the result of the election. A certified copy of the result of the election in each corporation shall be filed with the common council or board of trustees of the other corporation; and if a majority of the electors voting on the question in each of the corporations votes in favor of the union, then the two (2) corporations shall be united in accordance with the terms of the agreement theretofore entered into. A duly certified copy of the agreement, and of the result of the election, shall be filed in the office of the recorder of the county or counties in which the united corporation is situated, signed by the mayor or presiding officer and attested by the clerk, and sealed with the seal of each of the constituent corporations. Copies of the record shall be received in all courts and places as conclusive of the union of the corporation under the name so agreed upon.

* * * * *

Article IV. Annexation.

SEC. 401. The common council may, by ordinance, declare and define the entire corporate boundaries of the city, and the ordinances, properly certified, shall be conclusive evidence, in any court or proceeding, of the boundaries of the city. The ordinances defining the entire city boundary may include contiguous territory, whether platted or not, not previously annexed, and may include such terms and conditions, as hereinafter defined, as may be deemed just and reasonable by the common council, and the annexation ordinances shall become final and binding sixty (60) days after final publication thereof as required in section 402 of this article in the absence of remonstrance and appeal as provided in section 406 of this article.

SEC. 402. The common council may also, by separate ordinance not purporting to define the entire boundaries of the city, annex contiguous territory, whether platted or not, to the city, and may include such terms and conditions, as hereinafter defined, as may be deemed just and reasonable by the common council, and a certified copy of the ordinances shall be conclusive evidence in any proceeding that the territory therein described was properly annexed and constitutes a part of the city. The annexation ordinances shall become final and binding sixty (60) days after final publication thereof in the absence of remonstrance and appeal as provided in section 406 of this article. Immediately after the passage of every such ordinance the same shall be published once each week for at least two (2) consecutive weeks in accordance with Chapter 96, Acts of 1927, as amended.

SEC. 403. The terms and conditions applicable to the annexation may relate to any matter reasonably and fairly calculated to render the annexation just and equitable both to the city, its property owners and inhabitants, and to the annexed territory, its property owners and inhabitants, including, but not restricted to, such matters as: (a) postponing the effective

date of such annexation; (b) impounding in a special fund in whole or in part the municipal property taxes to be imposed upon the annexed territory after annexation shall take effect, in such amount and for such period of time, not to exceed three (3) years, as the common council may determine, and using the impounded taxes solely for the benefit of the annexed territory, its property owners and inhabitants, in the extension of municipal services and benefits and the making of municipal or public improvements in the annexed territory; or (c) establishing equitable provisions for the future management and improvement of the annexed territory and for the rendering of needed services.

SEC. 404. The mayor and the proper administrative board with the ratification and approval of the common council shall also have the power, in lieu of annexing contiguous territory or in cases not involving any proposed annexation of territory, to enter into contracts with the owners or lessees of designated property in the vicinity of the city, whether within or without the county in which the city is located, providing for the payment or contribution of money to the city to be used for such municipal or public purposes as may be specified in the contract, whether the payments are related to or in consideration of municipal services or benefits already received, or to be received under the contract or otherwise, by the property owners or lessees, or whether the payments are in lieu of taxes that might be levied upon annexation of the designated property, or whether the payments are wholly unrelated to municipal services or benefits to or potential tax impositions upon the designated property.

The contracts may be entered into for such period of time, not exceeding fifteen (15) continuous years under any one (1) contract, with first and second class cities, and not exceeding four (4) continuous years under any one (1) contract with third, fourth and fifth class cities, as the city and the property owners or lessees shall agree upon. Unless the control is induced

by the fraud of the property owners or lessees or is grossly and corruptly improvident on the part of the city, the same shall continue in force for the full term of the contract, or until the contract is terminated or reduced in duration by mutual agreement of both the city and the property owners or lessees, and, if the contract provides, during the effective term of any such contract the designated property of the contracting owners or lessees all not be subject to annexation by the contracting city.

Any other municipal authority having taxing power in respect to the designated property or entitled to share in the property taxes assessed and collected by the city may join in any such contract, or enter into a separate contract with the city, providing for the division and distribution of the payments to be made under the contract and for the receipt of a share thereof by such other municipal authority.

SEC. 405. Whenever the owners of real estate situated outside the corporate boundaries of any city, but adjacent thereto, desire to have real estate annexed to the city, they may file with the common council of the city a petition bearing the signatures of fifty-one percent (51%) of the owners of land in the territory sought to be annexed requesting a special ordinance for the purpose of annexing the contiguous territory described in the petition. If the common council fails to pass the special ordinance within sixty (60) days from the date of the filing of the petition, the petitioners may file a duplicate copy of the petition in the circuit or superior courts of the county where the territory is situated or with the judge thereof in vacation and the petition shall state the reason why the annexation should, in justice, take place. Notice of the proceedings, by way of summons, shall be served upon proper officers of the city to which the petition has been presented and the city shall become defendant in the cause and shall be required to appear and answer as in other cases. The court or judge thereof in vacation shall thereupon proceed to

hear and shall give judgment upon the question of annexation according to the evidence which either party may introduce. If the evidence establishes that:

(a) Essential municipal services and facilities are not available to the inhabitants of such territory; and

(b) The city is physically and financially able to provide municipal services to the area sought to be annexed; and

(c) The total resident population of the area sought to be annexed is equal to at least three (3) persons for each acre of land included within its boundaries; and

(d) At least one-eighth of aggregate external boundaries of the territory sought to be annexed coincide with the boundaries of the annexing city; the court shall order the proposed annexation to take place, notwithstanding the provision of any other law of this state.

If, however, the evidence does not establish all four (4) of the foregoing factors, the court shall deny the petition to annex and dismiss the proceeding.

SEC. 406. Whenever territory is annexed to a city, whether by general ordinance defining the city boundaries or by special ordinance for the purpose of annexing territory, an appeal may be taken from the annexation by either a majority of the owners of land in the territory or by the owners of more than seventy-five percent (75%) in assessed valuation of the real estate in the territory, if they deem themselves aggrieved or injuriously affected, by filing their remonstrances in writing against the annexation, together with a copy of the ordinance, in the circuit or superior courts of the county where the territory is situated or with the judge therefor in vacation within sixty (60) days after the last publication provided for in section 402 of this article. The written remonstrance or complaint shall state the reason why annexation should not in justice take place.

Upon receipt of the remonstrance, the court or the judge thereof in vacation shall determine whether it bears the neces-

sary signatures and complies with the requirements of sections 406 through 408 of this article. In determining the total number of landowners of the area and whether or not signers of the remonstrance are landowners, the names as they appear upon the tax duplicate shall be prima facie evidence of ownership. In ascertaining the number of landowners of the area and for the purpose of determining the sufficiency of the remonstrance as to the number of landowners required to constitute a majority, not more than one (1) person having an interest in a single property, as evidenced by the tax duplicate, shall be considered a landowner.

Upon the determination of the judge of the court that the remonstrance is sufficient he shall fix a time for a hearing on the remonstrance which shall be held not later than sixty (60) days thereafter. Notice of the proceedings by way of summons shall be served upon the proper officers of the city seeking to make annexation, and the city shall become defendant in such cause, and shall be required to appear and answer as in other cases.

SEC. 407. The judge of the circuit or superior court shall, upon the date fixed, proceed to hear and determine the appeal without the intervention of jury, and shall, without delay, give judgment upon the question of the annexation according to the evidence which either party may introduce. If the evidence establishes that:

(a) The resident population of the area sought to be annexed is equal to at least three (3) persons for each acre of land included within its boundaries or that the land is zoned for commercial, business or industrial uses or that sixty percent (60%) of the land therein is subdivided; and

(b) At least one-eighth of the aggregate external boundaries of the territory sought to be annexed coincide with the boundaries of the annexing city; and

(c) The annexing city has developed a fiscal plan and has established a definite policy to furnish the territory to be annexed within a period of three (3) years, governmental and proprietary services substantially equivalent in standard and scope to the governmental and proprietary services furnished by the annexing city to other areas of the city which have characteristics of topography, patterns of land utilization and population density similar to the territory to be annexed; the court shall order the proposed annexation to take place notwithstanding the provisions of any other law of this state.

If however, the evidence does not establish all three (3) of the foregoing factors the court shall sustain the remonstrance and deny the annexation unless the area although not meeting the conditions of factor (a) supra is bordered on one-fourth of its aggregate external boundaries by the boundaries of the city and is needed and can be used by the city for its future development in the reasonably near future, the court may order the proposed annexation to take place notwithstanding the provisions of any other law of this state. The laws providing for change of venue from the county shall not apply, but changes of venue from the judge may be had as in other cases. Costs shall follow judgment. Pending the appeal, and during the time within which the appeal may be taken, the territory sought to be annexed shall not be deemed a part of the annexing city.

SEC. 408. Upon the determination of the appeal, the judgment shall particularly describe the ordinance upon which the appeal is based, and the clerk of the circuit court shall forthwith deliever a certified copy of the judgment to the clerk or clerk-treasurer of the city, who shall record the same in the ordinance record and make a cross reference to the page thereof upon the margin where the original ordinance was recorded. In case the decision is adverse to annexation, no further annexation proceedings for the territory shall be lawful for two (2) years after the rendition of the judgment, unless the annexation is petitioned in conformance with provisions of section 405 of this article.

SEC. 409. Annexation of a city or town regardless of population shall not be made under any of the provisions of this article, but shall only take place in accordance with the provisions of Article III, Union of Cities and Towns, section 301.

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INDIANA ACTS 1905, CHAPTER 129, as amended by INDIANA ACTS 1955, CHAPTER 269 (Pre-1969 Civil Annexation Statute).

[S. 75. Approved March 6, 1905.]

AN ACT concerning municipal corporations.

SEC. 241. Where a city and a town, or two cities, or two towns, adjoin each other, they may be united provided a majority of the qualified voters voting on such question of union, in each of such adjoining corporations, shall vote in favor of such union. The common council of such city and the board of trustees of such town, or the common councils of such cities, or the boards of trustees of such towns, as the case may be, shall, by a resolution, passed by each council or board, first agree on the terms upon which such union shall take place, including the name by which the united corporation shall be known and the day upon which an election for the purpose shall be held in each of the adjoining muncipalities. Notice of such agreement shall be given at least twenty days before the time fixed for such election, by publication of the same for two weeks successively, once each week, in each newspaper published in each of such corporations, and by posting printed copies thereof in one or more public places in each ward of each of such corporations. Such election shall be held in the voting precincts of each of such corporations, as other city and town elections are held. The ballots for such election shall have thereon the words "Yes" and "No," and those electors favoring such agreement shall vote "Yes," and those opposed, "No;" and the election boards shall report to their respective common councils or boards of trustees the result of such election. A certified copy of the result of the election

in each corporation shall be filed with the common council or board of trustees of the other corporation; and if a majority of the electors, voting on such question in each of such corporations, vote in favor of such union, then the two corporations shall be united in accordance with the terms of the agreement theretofore entered into; and a duly certified copy of such agreement, and of the result of such election, shall be filed in the office of the recorder of the county or counties in which such united corporation is situated, signed by the mayor or presiding officer and attested by the clerk and sealed with the seal of each of such constituent corporations; and copies of such record shall be received in all courts and places as conclusive of such union of such corporations under the name so agreed upon. In case of such union, the new corporation shall be liable for all the debts, contracts and liabilities of the constituent corporations, and shall be entitled to all the rights, credis, moneys, effects and properties theretofore had, held or owned by them or either of them, and may sue and be sued in relation to such debts, contracts, liabilities, rights, credits and properties by the name adopted on such union. But all actions pending at the time of such union shall be prosecuted to final judgment and execution, and all judgments theretofore rendered may be executed and enforced against the new corporation, without any change of the name of the plaintiff or defendant.

SEC. 242. The common council shall have power, by ordinance, to declare and define the entire corporate boundaries of such city, and such ordinances, properly certified, shall be conclusive evidence, in any court or proceeding, of the boundaries of such city, except as provided in the next section. Such ordinances defining the entire city boundary may include contiguous territory, whether platted or not, not previously annexed, and may include such terms and conditions, as hereinafter defined, as may be deemed just and reasonable by said common council, and such annexation shall be binding, unless such newly annexed territory shall be within the limits of another

town or city, in which case there may be an appeal, as hereinafter provided. Said common council may also, by separate ordinance, not purporting to define the entire boundaries of such city annex contiguous territory, whether platted or not, to such city, and may include such terms and conditions, as hereinafter defined, as may be deemed just and reasonable by said common council, and a certified copy of such ordinances shall be conclusive evidence in any proceeding that the territory therein described was properly annexed and constitutes a part of such city, except as provided in the following sections. Immediately after the passage of each such ordinance as provided for in this section, the same shall be published for at least two (2) consecutive weeks in a daily newspaper of general circulation published in such city.

The terms and conditions applicable to any such annexation may relate to any matter reasonably and fairly calculated to render such annexation just and equitable both to the city, its property owners and inhabitants, and to the annexed territory, its property owners and inhabitants, including, but not restricted to, such matters as (a) postponing the effective date of such annexation, (b) impounding in a special fund in whole or in part the municipal property taxes to be imposed upon the annexed territory after annexation shall take effect, in such amount and for such period of time, not to exceed three (3) years, as said common council may determine, and using such impounded taxes solely for the benefit of such annexed territory, its property owners and inhabitants, in the extension of municipal services and benefits and the making of municipal or public improvements in the annexed territory, or (c) establishing equitable provisions for the future management and improvement of the annexed territory and for rendering of needed services.

The mayor and the proper administrative board with the ratification and approval of the common council shall also have the power, in lieu of annexing any such contiguous territory or in cases not involving any proposed annexation of territory, to

enter into contracts with the owners or lessees of designated property in the vicinity of the city, whether within or without the county in which the city is located, providing for the payment or contribution of money to the city to be used for such municipal or public purposes as may be specified in such contract, whether such payments are related to or in consideration of municipal services or benefits already received, or to be received under such contract or otherwise, by such property owners or lessees, or whether such payments are in lieu of taxes that might be levied upon annexation of such designated property, or whether such payments are wholly unrelated to municipal services or benefits to or potential tax impositions upon such designated property. Such contracts may be entered into for such period of time, not exceeding fifteen (15) continuous years under any one such contract, with first and second class cities, and not exceeding four (4) continuous years under any one such contract with third, fourth and fifth class cities, as the city and such property owners or lessees shall agree upon. Unless any such contract shall have been induced by the fraud of said property owners or lessees or shall be grossly and corruptly improvident on the part of the city, the same shall continue in force for the full term of such contract, or until such contract is terminated or reduced in duration by mutual agreement of both the city and such property owners or lessees, and, if the contract so provides, during the effective term of any such contract the designated property of such contracting owners or lessees shall not be subject to annexation by the contracting city. Any other municipal authority having taxing power in respect to such designated property or entitled to share in the property taxes assessed and collected by the city is hereby empowered to join in any such contract, or to enter into a separate contract with the city, providing for the division and distribution of the payments to be made under such contract and for the receipt of a share thereof by such other municipal authority (as amended by Acts 1955, ch. 269, § 1).

SEC. 242a. Whenever the owners of real estate situated outside the corporate boundaries of any city, but adjacent thereto, shall desire to have real estate annexed to such city, they may file with the common council of such city a petition bearing the signatures of fifty-one (51) percent of the owners of land in the territory sought to be annexed, requesting a special ordinance for the purpose of annexing the contiguous territory described in the petition. If the common council fails to pass such special ordinance, within sixty days from the date of the filing of the petition, the petitioners may file a duplicate copy of the petition in the circuit or superior courts of the county where such territory is situated or with the judge thereof in vacation and the petition shall state the reason why such annexation should, in justice, take place. Notice of such proceedings, by way of summons, shall be served upon the proper officers of the city to which the petition has been presented and such city shall become defendant in such cause and shall be required to appear and answer as in other cases. The court or judge thereof in vacation shall thereupon proceed to hear and determine such petition without the intervention of a jury and shall give judgment upon the question of such annexation according to the evidence which either party may introduce. Such evidence demonstrating the presence of the following conditions shall be considered the primary determinants of the annexation's merit:

(a) The annexation is in the best interests of the city and of the territory sought to be annexed.

(b) The area is urban in character, being an economic and social part of the annexing city.

(c) The terms and conditions set forth in the ordinance are fair and just.

(d) The city is financially able to provide municipal services to the annexed area within the reasonably near future.

(e) The area sought to be annexed, if undeveloped, is needed for development of the city in the reasonably near future.

(f) The lines of the annexation are so drawn as to form a compact area abutting the municipality.

If the court shall find that the primary determinants enumerated above apply to the annexation, it shall so take place notwithstanding the provisions of any other statute of this state. If however, the presence of the primary determinants prescribed in this section cannot be demonstrated in the evidence, the annexation shall not take place. (as amended by Acts 1955, ch. 269, § 2).

SEC. 243. Whenever territory is annexed to a city whether by general ordinance defining the city boundaries, or by special ordinance for the purpose of annexing territory, an appeal may be taken from such annexation by either a majority of the owners of land in the territory or by the owners of more than seventy-five (75) per cent in assessed valuation of the real estate in the territory, if they deem themselves aggrieved or injuriously affected, by filing their remonstrances in writing against such annexation, together with a copy of such ordinance, in the circuit or superior courts of the county where such territory is situated or with the judge thereof in vacation, within thirty days after the last publication provided for in Section 242; such written remonstrance or complaint shall state the reason why such annexation ought not in justice take place. Upon receipt of such remonstrance the court or the judge thereof in vacation shall determine whether it bears the necessary signatures and complies with the requirements of this section. In determining the total number of land owners of the area and whether or not signers of the remonstrance are land owners, the names as they appear upon the tax duplicate shall be prima facie evidence of such ownership. In ascertaining the number of land owners of the area and for the purpose of determining the sufficiency of the remonstrance as to the number of land owners required to constitute a majority, not more than one person having an interest in a single property, as evidenced by the tax duplicate, shall be considered a land owner. Upon the determination of the judge of the court that the remon-

strance is sufficient he shall fix a time for a hearing on the remonstrance which shall be held not later than sixty days thereafter. Notice of such proceedings by way of summons shall be served upon the proper officers of the city seeking to make annexation, and such city shall become defendant in such cause, and shall be required to appear and answer as in other cases. The judge of the court shall, upon the date fixed, proceed to hear and determine such appeal without the intervention of jury, and shall, without delay, give judgment upon the question of such annexation according to the evidence which either party may introduce. Such evidence demonstrating the presence of the following conditions shall be considered the primary determinants of the annexation's merit:

(a) The annexation is in the best interests of the city and of the territory sought to be annexed.

(b) The area is urban in character, being an economic and social part of the annexing city.

(c) The terms and conditions set forth in the ordinance are fair and just.

(d) The city is financially able to provide municipal services to the annexed area within the reasonably near future.

(e) The area sought to be annexed, if undeveloped, is needed for development of the city in the reasonably near future.

(f) The lines of the annexation are so drawn as to form a compact area abutting the municipality.

If the judge of the court shall find that the primary determinants enumerated above apply to the annexation, it shall take place notwithstanding the remonstrance and notwithstanding, further, the provisions of any other statute of this state. If, however, the presence of these primary determinants cannot be demonstrated in the evidence, the annexation shall not take place. The laws touching change of venue from the county shall not apply, but changes of venue from the judge may be had as in other cases. Costs shall follow judgment. Pending such appeal,

and during the time within which such appeal may be taken, such territory sought to be annexed shall not be deemed a part of the annexing city. Upon the determination of such appeal, the judgment shall particularly describe the ordinance upon which the appeal is based, and it shall be the duty of the county clerk to forthwith deliver a certified copy of such judgment to the clerk of such city, who shall record the same in the ordinance record, and make a cross reference to the page thereof upon the margin where such original ordinance was recorded. In case the decision is adverse to such annexation, no further annexation proceedings for such territory shall be lawful for two years after the rendition of such judgment, unless such annexation is petitioned in conformance with provisions of Section 242a, hereof: Provided, That in case any incorporated town or city shall be located within the corporate limits of such other city and not annexed as contemplated in this act, such incorporated town or city so located as aforesaid, shall not be entitled to have or receive from such incorporated city within which it is located, any fire or police protection, until such minor town or city shall first have entered into a contract or agreement with the city within which it is located, binding such minor corporation to pay a reasonable compensation to be agreed upon mutually by such corporate authorities. The same regulation shall apply to sweeping, cleaning and sprinkling service, and to sewer privileges: Provided, That if the corporate authorities of such municipalities can not mutually agree as to the compensation to be paid for such services and privileges by such minor town or city, either of such municipalities may by petition present the matter to the judge of the circuit court of the county in which such municipalities are located, who shall cause such other town or city to be notified of such petition, and require the same to answer thereto, and shall have jurisdiction on such applications to hear and determine such matter and determine and fix such reasonable compensation, and his adjudication shall be final. The cost of such proceedings shall be paid by the municipality making such application. (As amended Acts 1955, ch. 269, § 3.)

SEC. 244. No such annexation shall be made, under the foregoing sections of a part of the territory of any other incorporated town or city, but only of the whole corporate territory thereof. In case of such annexation, the two corporations shall be deemed to be consolidated, and the consolidated corporation shall be bound for all the debts and liabilities, and shall be the owner of all corporate property, franchises and rights of every nature, of both of such municipal corporations: Provided, however, That no incorporated city or town regardless of population shall be annexed under any of the provisions of sections 242, 242a and 243 of this act but shall only take place in accordance with the provisions of section 241 of this act. (As amended Acts 1955, ch. 269, § 4.)

[5]INDIANA ACTS, 1959, CHAPTER 202, as amended by INDIANA ACTS, 1961, Chapters 231 and 302 (The School Corporation Reorganization Act)

[S. 6 Approved March 12, 1959.]

AN ACT to declare the policy of the state with regard to the reorganization of school corporations in order to establish and maintain a more uniform and thorough system of public schools; to prescribe the procedure by which reorganization of school corporations may be achieved; to provide for a State Reorganization Commission and for a County Reorganization Committee in each county in the state; to describe the powers and duties of such commission and committees; to set forth the responsibilities of existing state, county, and school corporation officers with respect to reorganization of school corporations; to guarantee to the electors of each school corporation the opportunity of participation in proposed reorganization plans; to provide for appeals from decisions of officers entrusted with authority under the provisions of this act; to define the administration of reorga-

5. Codified in its current amended form as IC 20-4-1.

nized school corporations; to provide appropriations for carrying out the provisions of this act; and to supplement existing laws with the provisions of this act.

Be it enacted by the General Assembly of the State of Indiana:

SECTION 1. It is the sense of the Indiana General Assembly now assembled: That the establishment and maintenance of a general, uniform and efficient system of public schools is the traditional and current policy of the State of Indiana; that improvement in the organization of school corporations of the state will provide a more equalized educational opportunity for public school pupils, will achieve greater equity in school tax rates among the inhabitants of the various now existing school corporations, and will provide a more effective use of the public funds, expended for the support of the public school system; that existing statutes with respect to the combination and the reorganization of school corporations are inadequate to effectuate the needed improvement; that modifications in the statutory provisions for the combination and the reorganization of school corporations provided in this act are necessary in order to assure the future maintenance of a uniform and efficient system of public schools in the state; that local electors have an interest in the boundaries of the school corporation in which they reside and will exercise their privileges, as herein provided, to the end of establishing an efficient and economical reorganization plan best suited to local conditions; that the commission, committees, and the public officers charged with authority under this act will perform their duties wisely in view of the objective of this act as set forth in the title of this act.

SEC. 2. This act shall be known and may be cited as "The School Corporation Reorganization Act of 1959."

SEC. 3. As used in this act, unless context clearly requires otherwise, the following terms shall have the meanings here set forth:

(1) "School corporation" shall mean and include all local school corporations in the State of Indiana.

(2) "Reorganization of school corporations" shall mean and include the formation of new school corporations, the alteration of the boundaries of established school corporations, and the dissolution of established school corporations, through or by means of (a) the uniting of two or more established school corporations; (b) the subdivision of one or more school corporations; (c) the transfer to any established school corporation of a party of the territory of one or more school corporations, and/or the attachment thereto of all or any part of the territory of one or more school corporations, and/or the transfer of said established school corporation; and (d) any combination of the methods aforementioned.

(3) The term "community school corporation" shall mean a school corporation proposed to be formed or formed under the provisions of this act and shall include a united school corporation as hereinafter defined.

(4) A "united school corporation" shall mean a school corporation having territory in two or more adjacent counties.

(5) An "administrative unit" shall mean a school corporation comprising all the area under a single system of local administration and under the control of a local board of education, board of school trustees or board of school commissioners.

(6) An "attendance unit" or "school unit" shall mean the geographical and population area served by a single school, consisting of part, or all, of an administrative unit.

(7) "County Committee" or "Committee" shall mean the County Committee for the Reorganization of School Corporations, provided for in section 5 hereof.

(8) "State Commission" or "Commission" shall mean the State Commission for the Reorganization of School Corporations, provided for in section 6 hereof.

(9) "State Department" shall mean the State Department of Public Instruction.

(10) "State Superintendent" shall mean the State Superintendent of Public Instruction.

(11) "County superintendent" shall mean the county superintendent of schools.

(12) "Party" includes any persons, firm, corporation, association, or municipality interested in any proceedings under the provisions of this act.

SEC. 5. (1) Within three (3) months after the approval of this act, there shall be created in each county in the state a county committee for the reorganization of school corporations, which shall consist of the county superintendent of schools and eight (8) members appointed by the judge of the circuit court of the county.

* * * * *

(2) Within one (1) year after the date of the county convention, the county committee shall complete the preparation of a preliminary written plan for the reorganization of school corporations within the county.

Such plan shall provide for the incorporation of all areas of the county into one or more administrative units that can provide an adequate educational program for grades one (1) through twelve (12).

* * * * *

The county committee shall have the power and it shall be its duty to determine, as to each of the community school corporations which are a part of the reorganization plan:

(a) The name of the community school corporation;

(b) The boundaries of the community school corporation;

(c) The number of members on the board of school trustees, the designation of the officers of such board of school trustees, whether the board of school trustees shall be elected at the primary or at the general election, and, subject to the provisions of subdivisions (3) and (4) of section 9 of this act,

the manner in which such board of school trustees shall be elected or appointed: Provided, however, That the total number of school trustees shall not be less than three (3) nor more than seven (7).

(d) Whether the community school corporation and board of school trustees shall have the rights, powers, duties and liabilities vested in boards of school trustees of cities of the fifth class or the rights, powers, duties and liabilities vested in the board of school trustees of the school corporation which has the largest enrollment and which will be a part of the community school corporation, under the laws of the State of Indiana;

(e) Limitations on residence, term of office and other qualifications required of the members of such board of school trustees: Provided, however, That no plan shall provide for an appointive or elective term of more than four (4) years, but any member may succeed himself in office.

(5) When any county committee has prepared its preliminary written plans, maps, and charts for reorganization of school corporations, it shall fix dates and places for hearings thereon and give notice thereof to all the residents of the school corporations affected and all interested parties. Such notice shall be given by the chairman of the county committee by publication at least once in one (1) newspaper of general circulation published in the school corporation or corporations, and if no newspaper is published in the school corporation or corporations, then in a newspaper having a general circulation within the school corporation or corporations, at least ten (10) days but not more than thirty (30) days prior to the date set for such hearing.

* * * * *

(6) The committee shall consider any suggestions made in the public hearing, and shall make any revisions or modifications in its written plans as it deems necessary and shall thereupon adopt its final comprehensive reorganization plan, and,

within ten (10) days after such adoption, but not later than eighteen (18) months after the creation of the county committee, shall submit at least two copies of its comprehensive plan to the State Commission: . . .

* * * * *

(8) The comprehensive plan shall show as to each of the community school corporations covered thereby:

(a) The name of the community school corporation;

(b) The boundaries of the community school corporation;

(c) The number of members on the board of school trustees, the designation of the officers of such board of school trustees, whether the board of school trustees shall be elected or appointed and if elected whether they shall be elected at the primary or at the general election, and, subject to the provisions of subdivisions (3) and (4) of section 9 of this act, the manner in which such board of school trustees shall be elected or appointed: Provided, however, That the total number of school trustees shall not be less than three (3) nor more than seven (7);

(d) Whether the community school corporation and board of school trustees shall have the rights, powers, duties and liabilities vested in boards of school trustees of cities of the fifth class or those rights, powers, duties and liabilities vested in the board of school trustees of the school corporation which has the largest enrollment and which will be a part of the community school corporation, under the laws of the State of Indiana;

(e) Limitations on residence, term of office and other qualifications required of the members of such board of school trustees: Provided, however, That no plan shall provide for an appointive or elective term of more than four (4) years, but any member may succeed himself in office;

(f) The disposition of the assets and liabilities of each existing school corporation.

* * * * *

(9) All superintendents of local school corporations and the county superintendent shall comprise an advisory committee to the county committee. Such advisory committee shall render such help to the county committee as may be requested by the county committees from time to time (as amended by Acts 1961, ch. 231, § 1).

SEC. 6. (1) Within thirty (30) days after the approval of this act, the State Commission for the Reorganization of School Corporations shall be created. The Commission shall consist of the State Superintendent of Public Instruction, the Attorney General and seven (7) members appointed by the Governor of the State of Indiana, one (1) of whom shall be a member of the State Tax Board, and one (1) of whom shall be a member of the State Board of Accounts. The other five (5) appointed members shall be residents of the State of Indiana who are well informed concerning the problems of the public schools of the state and who shall be representative of the various sections and interests of the state, but shall not be officers or employees of the State of Indiana or any of its political subdivisions or of any local board of school trustees, board of school commissioners or county board of education. The governor shall appoint such appointive members of the Commission without regard to political affiliation and designate one of the members so appointed as chairman. At its first meeting the State Commission shall elect a secretary from among its members.

* * * * *

(3) The State Commission shall have the following powers and duties:

* * * * *

(c) The State Commission shall receive and examine each plan for the reorganization of school corporations submitted to it by the County Committees, and approve such plan when it is found by the State Commission to provide for a satisfactory school organization.

(d) The State Commission shall formulate and adopt a set of minimum standards which all proposed reorganized school corporations must meet, in so far as possible. Such minimum standards shall include, but shall not necessarily be limited to, the following:

(1) All county plans shall provide for the inclusions of all the area of the county in a school corporation or school corporations, in order to furnish efficient and adequate educational opportunity for all the pupils in grades one (1) through twelve (12).

(2) Each community school corporation shall be as nearly as practicable a natural social and economic community, but may include all the territory of a county, or all of the territory of a county and territory from contiguous counties.

(e) The State Commission shall, within sixty (60) days after receipt of a reorganizational plan, hold a public hearing in the county to which such reorganizational plan mainly appertains at which residents of the county or of any school corporation affected in an adjacent county or any other interested party shall be afforded an opportunity to appear before the State Commission and be heard with reference to such reorganization plan.

After such hearing, the State Commission shall, within sixty (60) days, approve in writing the plan if found satisfactory and so notify in writing the County Committee or County Committees concerned.

* * * * *

SEC. 7. (1) At any time after the date an approved plan is received by the county committee from the State Commission, a community school corporation provided for in such approved plan may be created and established by a petition stating that the signers request the establishment of the community school corporation, as provided in said approved plan, which petition shall be signed by fifty-five per cent (55%) or more

of the registered voters residing within the boundaries of the community school corporation.

* * * * *

The clerk shall establish a record of his certification in his office, and shall return the petition together with his certification to the county committee. If the certification or certifications received from the clerk or clerks disclose that fifty-five per cent (55%) or more of the registered voters residing within the boundaries of the community school corporation have signed the petition, the county committee shall publish in two (2) newspapers of general circulation within the boundaries of the community school corporation a notice stating that the steps necessary to the creation and establishment of the community school corporation have been completed, and setting forth (a) the number of registered voters residing within the boundaries of the community school corporation who signed the petition and (b) the number of registered voters residing within the boundaries of the community school corporation.

The community school corporation shall be created and some into being on July 1 or January 1 following the date of publication of said notice, whichever date is the earlier.

* * * * *

(2) If within ninety (90) days from the date of receiving an approved plan from the State Commission, a petition, in the form described in subsection (1) of this section, is not received by the county committee for any community school corporation set forth in the approved plan, then the county committee shall within ten (10) days thereafter, report such fact to the judge of the circuit court, who shall call a special election of the registered voters residing within the boundaries of each such community school corporation at the time of the next succeeding primary or general election, whichever is earlier, following such report by the county committee. Notice of such special election shall be given by publication. . . .

* * * * *

If a majority of the votes cast at such election are in favor of the formation of such corporation, a community school corporation shall be created and come into being on July 1 or January 1 following the date of publication of said notice, whichever date is the earlier.

(2a) In instances where the proposed school corporation reorganization plan approved by the State Commission involves no change in territorial boundaries or in the board of school trustees or other governing body of a school corporation, other than a change, if any, in the time of election of board members, or the time such board members take office, such approved plan shall automatically come into being on either July 1 or January 1 following the date of such approval, whichever is earlier. In such event, no interim board member shall be appointed, the board members in office on such date shall continue to constitute the governing body of the school corporation until their successors are qualified, and the terms of their respective offices and their board memberships shall remain unchanged except to the extent the plan provides otherwise.

(3) If a proposal for the formation of a community school corporation is rejected by the voters at the election provided for in the foregoing paragraphs of this section:

(a) The county committee may direct the judge of the circuit court to resubmit the same plan at the next primary or general election called and conducted in the same manner to be held not earlier than one year from the date of the election at which the plan was rejected: Provided, however, That there shall be no more than two special elections held on the same plan of reorganization, without the approval of the State Commission.

(b) The county committee may devise a new plan of reorganization deemed more acceptable to the electors of the territory affected and submit such new plan to the State Commission for approval in the same manner as the original plan was

submitted. If the new reorganization plan is approved by the State Commission, a special election shall be held as provided in subsection (2) of this section, and if the new plan is approved by the electors in the manner provided in subsection (2) of this section, the new corporation shall be established in the manner provided in said subsection (2) of this section.

(c) The judge of the circuit court may, notwithstanding the provisions of subsections (a) and (b) of this section, discharge anyone or all of the nine members of the county committee appointed by the judge of the said circuit court pursuant to section 5 of this act and may select another person or persons to fill the vacancy or vacancies thereby created without regard to the qualifications required by subsection 1 of section 5 of this act. Thereafter said newly appointed county committee shall have all of the rights, powers and duties of the original county committee appointed under this act, but shall not be bound by any plan adopted by the original county committee (as amended by Acts 1961, ch. 302, §-1).

* * * * *

[6]SEC. 9. (1) Every community school corporation which shall be established pursuant to the provisions of this act, when validly organized and existing, is hereby declared to be a body corporate and politic and may sue and be sued, and may acquire, hold, and convey real and personal property necessary to its establishment and operation (as amended by Acts 1961, ch. 302, § 2).

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6. Codified as IC 20-4-1-26(1).

Supreme Court, U. S.
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SEP 10 1980
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Nos. 79-2067 and 80-129

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

METROPOLITAN SCHOOL DISTRICTS OF LAWRENCE TOWNSHIP, MARION COUNTY, INDIANA, ET AL.,

Petitioners

vs.

DONNY BRURELL BUCKLEY, ET AL.,

Respondents

PETITIONERS' REPLY BRIEF

BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, ET AL.,

Cross-Petitioners,

vs.

METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA, ET AL.,

Respondents.

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI*

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* Lawrence Petitioners have filed this Reply Brief and Brief in Opposition to the Cross-Petition under an authorization to delay filing the Reply Brief until after receipt of the Opposition Briefs in order to simplify the presentation of the issues. Each brief has here been limited to the applicable page limitations.

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PETITIONERS' REPLY BRIEF

Argument

All three opposition briefs (United States, IPS and Intervenors)[1] assert that Lawrence Petitioners' petition for certiorari ("Petition") raises only the correctness of the lower courts' factual determinations under applicable law—disregarding the Appeals Court majority's departure from the existing authorities of this Court raised in the questions set out in the Petition.[2]

Question 1(a)—The Impact of Milliken. Did the 1969 Indiana General Assembly ("Legislature"), in reorganizing the splintered and over-lapping units of civil government in Indianapolis and Marion County have an affirmative Fourteenth Amendment duty to black students attending IPS schools to lessen the racial differences between that district and the other school districts in Marion County?

Prior to 1969, one method of expanding IPS boundaries was afforded by § 9 of a 1961 school annexation statute applying solely to Marion County providing that an annexation by a civil city or town also constituted a school annexation. This was subject, however, to the substantial statutory limitations set out in the Petition at pp. 8-11.[3] As a practical

1. These abbreviated references refer to the Respondents, United States, Board of School Commissioners of the City of Indianapolis, and Donny Brurell Buckley, et al. "Lawrence Petitioners" refers to The Metropolitan School District of Lawrence Township, Marion County, Indiana, et al.

2. Intervenors' additional assertion that none of the questions raised by Lawrence Petitioners was actually decided by the Court of Appeals (Int. Br. 12) is refuted by the substance of Judge Tone's dissent and by Lawrence Petitioners Appellants' brief and reply brief filed with that court in Cause Nos. 1997-2001.

3. Other methods include and still consist of transfer of territory by agreement of school corporations (IC 20-3-14-3; J.A. 139), unilateral annexation of territory (IC 20-3-14-4; J.A. 141), further reorganization (IC 20-4-1-30) and school corporation consolidation (IC 20-4-8).

School corporations throughout Indiana have for many years been independent of local civil government, and except for Marion County's tenuous boundary connection have had, since reorganization under the 1959 Reorganization Act, boundaries entirely independent of civil boundaries.

matter, however, civil annexation (and, therefore, expansion of IPS by this method) had become impossible because of taxpayer opposition permitted under the school and civil annexation statutes, and the boundaries of IPS had become fixed (Petition 16). At that point IPS, as many inner-city school districts, had a different racial balance than its neighbors, not created, however, by any invidious state action. Some civil government relief from fixed civil boundaries had been obtained by the creation of county-wide districts for the performance of limited functions, but this "solution" created overlapping jurisdictions with resulting inefficiency and confusion. (Petition 12)

In its 1969 session, the Legislature adopted the Uni-Gov legislation to restructure Marion County's chaotic civil government avoiding the problem of annexation by merging the Indianapolis Civil City into a new form of municipal government called a Consolidated City (J.A. 157; § 103), with boundaries extending part-way to the Marion County lines but without extending all city services. The legislation also combined substantial Consolidated City and County legislative and administrative functions. *See,* Petition, 12-13. By extending the boundaries of the new civil city entity by statute (rather than through civil annexation by city council action subject to taxpayer and other remonstrance), Uni-Gov formally rendered civil annexation in Marion County as irrelevant to school boundary change as it had become in practice and as it was throughout the rest of Indiana. At this same 1969 session, the Legislature also repealed Section 9 of the 1961 School Annexation statute by legislative action first commenced in 1967 and described *infra,* p. 7.

While recognizing that there is no duty to adjust differing racial balances as between school districts, both the Court of Appeals majority and the Respondents suggest: (i) the Indiana General Assembly had an affirmative duty to adjust IPS and other Marion County school district racial balances

because its 1969 legislation prevented IPS from dispersing black students from the *de jure* segregated inner-city schools into white suburban areas; and (ii) the Legislature's "discriminatory" refusal to expand IPS had the effect of keeping blacks out of suburban area (U.S. Br. 15; IPS Br. 22).

If the racial differences between school districts are not actionable, and since this Court has held in *Milliken v. Bradley,* 418 U.S. 717, 746, (1974), that

> "Disparate treatment of white and Negro students occurred within the Detroit school system, and not elsewhere and . . . the remedy must be limited to that system",

how can a different rule be applied here? Where boundaries had become fixed (as in both IPS and Detroit) without invidious State action, how can a failure to expand boundaries be actionable within the meaning of such cases as *Dayton Board of Ed. v. Brinkman,* 433 U.S. 406, 413-14 (1977)? "Impact" and "intent" come into play only where there is an affirmative duty to act.

The analysis made by the Solicitor General when this case was previously in this Court (October Term, 1976) on substantially the same record is still applicable:[4]

> "The record does not contain direct evidence showing why the Indiana General Assembly chose not to consolidate the school corporations in Marion County, and this is not a case in which acts have a racially disproportionate impact inexplicable in the absence of discriminatory intent. The failure to alter the *status quo* has no independent effect at all. The court of appeals' decision would be correct, therefore, only if a State has an affirmative duty to eliminate racially disproportionate school populations in different school districts. There is no such duty, however, unless the disproportion in the racial characteristics of the students of the different districts was caused by state action."

4. Brief for the United States, Cause Nos. 76-212, 76-548, 76-468, 76-515, 76-520 and 76-522, at pp. 12-13.

Finally both the Court of Appeals and the Respondents (IPS Br. 20-21) assert that where a State chooses to act, it is obligated to do so in a nondiscriminatory manner citing *Evans v. Buchanan,* 393 F.Supp. 428 (D. Del.), *aff'd.,* 423 U.S. 963 (1975). But that case is inapplicable—it involved the constitutionality of a school boundary reorganization statute giving the Delaware State Board of Education the power for one year to consolidate any school corporation without a referendum otherwise required for a consolidation. It specifically excluded from its operations, however, the City of Wilmington and one other school district.

The decision rested not only on the fact that Wilmington had never desegregated its school system since 1954, but on broader bases: that the statute was designed for school boundary reorganization; that until 1954 dual school systems had been mandated throughout Delaware by statute; that interdistrict transfers between Wilmington and the surrounding school districts had been used to effect this required *de jure* segregation for many years, segregation constituting a cooperative venture involving both city and suburbs; and that Wilmington and suburban districts had not been meaningfully separate and autonomous. 393 F. Supp. at 430, 433 and 437. The segregation within Wilmington was not the result of State action limited to its boundaries. Furthermore, as the case entered remedial stages, the underlying theory of the school remedy became firmly rooted in these facts. *Evans v. Buchanan,* 582 F.2d 750, 763-64 (3rd Cir. 1978), *cert. den.* 48 U.S.L.W. 3696 (April 29, 1980).[5]

In contrast, Uni-Gov had no effect on school boundaries; *de jure* segregation was not mandated by Indiana after 1877; except in IPS it was not practiced by any of the school corporations in Marion County; and IPS segregation was

5. See also Justice Brennan's denial of a stay in this case, 430 U.S. 1360, 1362-63 (1978), and a separate lower court action on stay specifically distinguishing the Indianapolis case on these grounds. *Evans v. Buchanan,* 435 F.Supp. 832, 846, n. 48 (D. Del. 1977).

not a cooperative effort between IPS and its neighbors. Further, the changes effected by the 1969 legislation had no effect on school boundaries.

Question 1(b)—The Requirements of Arlington Heights. In determining that the Legislature acted with a discriminatory purpose in adopting the 1969 legislation, did the Court of Appeals majority follow the standards required in *Village of Arlington Heights v. Metropolitan Development Corporation,* 429 U.S. 252 (1977), or any reasonable equivalent?

First, the legislation had no impact. The racial differences between IPS and the surrounding school corporations were created long before 1969 and the adoption of the 1969 legislation. A failure to redress this balance is not discriminatory and does not constitute a constitutional violation.

Second, what is the historical background indicating a series of official action taken for an invidious purpose? Aside from the permitted segregation by law in IPS (not existing generally throughout the State), this consisted of: a series of statutes first adopted in the 1800's limiting blacks' rights, *e.g.* interacial marriage; the failure to enforce the 1885 law against discrimination in public accommodations until the decade prior to 1971, (332 F.2d 661); the failure to admit blacks to public parks until after World War II (Ibid.); with respect to housing, the use of anti-discrimination clauses in deeds or plats and their routine enforcement until 1948 (Id. at 663); prior housing discrimination by realtors; private harassment of blacks buying homes within the Indianapolis area, and newspaper advertisement of "homes for colored" (Ibid.); the adoption of an Indianapolis ordinance in 1926 attempting to separate white and black residential areas declared unconstitutional by a local court soon after its passage (Ibid.); a statement from a monograph that it was common knowledge that in many smaller, and in some larger Indiana communities,

blacks were not permitted to stay overnight, a custom enforced by police action—all without relationship to time or any specified area (Id. at 663); the siting of public housing projects discussed below. Except for the latter, none of these acts were found by the District Court or the Court of Appeals to be a basis for an interdistrict remedy (J.A. 12-13); the state-related incidents are remote in time; and private discrimination is not relevant to a school case. These types of discrimination have been widespread throughout the United States. Basing a school desegregation case on them makes *Washington v. Davis,* 426 U.S. 229 (1976) and *Arlington Heights, supra,* meaningless. *Cf., City of Mobile v. Bolden,* — U.S. —, 64 L.Ed.2d 47, 63 (1980). Neither the Appeals Court majority opinion nor the Respondents thus limit the relevance of these factors. (J.A. 7; IPS Br. 7, U.S. Br. 11.)

Third, the specific sequence of events leading to the 1969 legislation does not indicate discrimination and there was, in the adoption of the 1969 legislation, no departure from the normal procedural sequences. *See,* Dis. Op., J.A. 33, n. 10.

Fourth, contemporary statements by members of the decision-making body indicated racial factors were not involved in the adoption of this legislation.

Fifth, as pointed out in the dissent in detail, the majority's entire finding of intent, even assuming its relevance, is based on (i) a purported change in the substantive policy in the method of changing IPS boundaries to the Indianapolis Civil City boundaries; (ii) without reference as to whether the change was selected in spite of and not because of its adverse effects, if any, upon black students; or (iii) whether the changed policy was considered important by the Legislature strongly favoring a decision contrary to the one reached. *See, Village of Arlington Heights, supra,* 429 U.S. at 267.

It is superfluous to retrace the superb analysis of policy

in the dissenting opinion (J.A. 33-45). One wonders, however, how a court could find a policy "strongly held" by the Legislature when it: (i) had been entirely abandoned throughout all of Indiana under the School Reorganization Act in 1959; (ii) was substantially inoperative under the ameliorating but restrictive provisions of the 1961 School Annexation Act applicable only to Marion County (JA. 139; Petition 9-11), and (iii) was unnecessary to a legitimate and exemplary reform of civil government.

While not crucial to this analysis, the Court of Appeals' majority suggestion that invidious purpose is somehow shown by the repeal in 1969 of § 9 of the 1961 School Annexation Act is fatuous. Section 9 of the Annexation Statute cannot reasonably be read to provide that the operation of Uni-Gov would automatically extend school boundaries under the 1961 Annexation Act to the new Consolidated City's boundaries (Petition 18-19); and the suggestion that this must have been the case because otherwise the repeal would have been futile is equally unreasonable. The legislative repeal of § 9 was commenced in 1967 to prevent the administrative and financial problems incident to tying any school annexation to civil annexation. (See, Dis. Op., J.A. 37-40; Maj. Op., J.A. 10; IPS Br. 9, n. 11.) This statute was promoted by local school corporations, including IPS, in 1967 and was no more futile in 1967 than it was in 1969, whether or not Uni-Gov had been adopted.

While this Court normally gives deference to determinations of the District and Circuit Courts as Respondents argue in supporting this reasoning (U.S. Br. 12, n. 7), it will not do so when such an interpretation of state law is unreasonable. *See, Propper v. Clark,* 337 U.S. 472, 486-488, (1949) in which this Court made a detailed analysis of the involved statutes in determining the reasonableness of the interpretation. Furthermore, this Court has never hesitated to find a Court of Appeals wrong on a factual matter when it was clearly in error. *See, e.g., Hills v. Gau-*

treaux, 425 U.S. 284, 294, n. 11 (1976); *City of Mobile v. Bolden,* — U.S. —, 64 L.Ed.2d 47, 53 (1980). Further, the District Court never adopted the Court of Appeals' majority interpretation of the 1961 School Annexation Act.

The Court of Appeals majority not only failed to find sufficient facts to justify invidious purpose under *Arlington Village* but was clearly erroneous in analyzing the one charge of discriminatory purpose proffered.

Question 2(a)—The Open Question of Swann. Will discriminatory siting of public housing support a school remedy? As noted in the Petition, this is still an open question. The United States agrees (U.S. Br. 19; *cf.,* IPS Br. 18) but argues that HACI's actions here support a remedy because the housing sitings involve school enrollment, but this will be true of any housing violation since school-age children live in housing. Respondents have not answered the question of whether the school corporations, which have no control over housing policy, should be forced to take affirmative action to remedy a failure by any agency which does—the question specifically left open by *Swann v. Charlotte-Mecklenburg Bd. of Education,* 402 U.S. 1, 22 (1971).

Question 2(b)—The Effect of Valtierra. How, consistently with *James v. Valtierra,* 402 U.S. 137 (1971), can the Court of Appeals majority find a discriminatory intent in HACI's location of public housing projects in the 1960's in the civil city of Indianapolis?

Respondents assert that *Valtierra* is inapplicable since proof was there lacking "that race was a factor in any governmental decision" (U.S. Br. 14, n. 14), but this is inaccurate. As shown by the briefs of counsel in that case (28 L.Ed.2d 1092, 1095), it was argued that a failure to accept public housing discriminated against both persons of low income and race. Further, as shown by the District Court's opinion in that case, *Valtierra v. Housing Authority of the*

City of San Jose, 313 F. Supp. 1, 5 (N.D. Cal. 1970), minorities were over-represented in less than standard housing by greater than four-to-one, and occupied nearly one-third of the deteriorating and delapidated housing. The decision had a racial impact but racial purpose was not shown, as it has not been shown in this case (*see,* Petition 24-25).

The majority opinion relies on four factors (J.A. 14), all embellished by Respondents (U.S. Br. 14; IPS Br. 18): First, a history of racial discriminations, noted at p. 5 *supra,* indigenous in much of America where blacks and whites have lived in the same area. Second, the natural and foreseeable consequences of site selection practices, which is another word for "impact" and falls within the rule of *Valtierra.* Third, the absence of convincing non-racial justification for HACI in locating projects outside IPS. As noted in the dissenting opinion, however, it was not HACI's refusal to enter into a cooperation agreement but that of the Marion County Council and Board of Commissioners, as to whose intent there was no evidence. *See,* Dis. Op., J.A. 45-51. Fourth, the discriminatory intent of the Planning Commission in matters "*not directly related to housing*" (Maj. Op., J.A. 14). The Planning Commission, however, had no control over the location of housing which, under Indiana law, was the sole province of HACI (IC 18-7-11-8), subject, under Federal law, however, to the execution of a cooperation agreement by the governing body of the territory where the project was to be located—here, the Marion County Council and the Board of County Commissioners. *See,* Maj. Op., J.A. 15 and 42 U.S.C. § 1415, J.A. 169.

Conclusion. The history of this case, both in the District Court and the Circuit Court of Appeals, is a continuing attempt to broaden the remedy for major city segregation (here IPS) both by standards and findings inconsistent with this Court's prior rulings. Lawrence Petitioners urge that their Petition for Certiorari be granted.

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

Argument

Inter-Relation Between Intradistrict and Interdistrict Relief. IPS, arguing that the ordered interdistrict relief is discriminatory, treats this relief as separate from the intradistrict relief within IPS ordered to remedy its *de jure* segregation, but this is incorrect.

As a substantive matter, the District Court has consistently held that remedying IPS segregation solely within its borders cannot be ordered because "in the long haul, it won't work," citing *Green v. Board of Education of New Kent County,* 391 U.S. 430 (1968), and that a remedy for this segregation must involve transfer of students to adjoining school corporations. The linking of intra- and interdistrict remedies has been raised by the District Court in each of its various opinions, as follows: 1971 Opinion, 332 F.Supp. at 676, 678; 1973 Opinion, 678 F.Supp. 1191, 1197, 1205 (IPS. App. A17, A33); 1975 Opinion, 419 F.Supp. 180, 184, (S.A. 41-43); 1978 Opinion, 456 F.Supp. 183, 191 (J.A. 84, 98-99); District Court Order of June 2, 1978, Appendix, *infra,* A6-A7.

As a substantive matter, the Court of Appeals, commencing with its 1976 Opinion in 541 F.2d 1211 (vacated and remanded by this Court, 429 U.S. 252), has premised its requirement for interdistrict relief, at least in part, on the necessity of remedying the *de jure* segregation occurring wholly within IPS:

> "The General Assembly, under both Federal law . . . and Indiana law . . . had an obligation to alleviate the segregated condition in IPS. This record fails to show any compelling state interest that would have justified the failure to include IPS in the Uni-Gov legislation.: (Citations omitted; 541 F.2d, 1211 at 1220; J.A. 19)

This part of this opinion was used by the District Court in its 1978 remand decision to justify its compliance with *Milliken,* 456 F.Supp. 183, 191 (J.A. 86). Further, the Court of Appeals majority in its 1980 opinion held that the Uni-Gov legislation met the requirements of *Milliken,* (J.A. 4), citing as authority its *1978* plurality decision (573 F.2d 400, 408; J.A. 64-65) where in justifying an interdistrict remedy under *Milliken,* the majority had stated:

> "In what way did the State's choice of retaining the old IPS boundary in lieu of expanding it with the city boundary have a segregative impact? It did so, we think, in curtailing the power of IPS to remedy its own violations. . . . If IPS were recalcitrant about correcting its own violation, the district court could have more readily ordered such dispersal of black school population without curtailment of district lines."

Furthermore, the intra- and interdistrict relief has been linked procedurally. The District Court has refused until now to order complete intradistrict relief without interdistrict relief. Further, the Court of Appeals in orders entered August 7 and August 23, 1979, consolidated the intra- and interdistrict cases (*see,* Appendix, *infra,* A1 and A3), and on August 11, 1979, ordered, at IPS' request, an additional hearing on remedy, holding the interdistrict appeals in abeyance (Appendix with U.S. Br. 1a). This effectively postponed intradistrict relief for a year, while the Court of Appeals considered both intradistrict and interdistrict relief together.

Finally, IPS in its brief in pposition to Lawrence Petitioners' Petition, argues vigorously that the State's involvement in racially discriminatory school actions justified the interdistrict relief (IPS Br. 16-17), and that the Court of Appeals was clearly correct in concluding that the 1969 legislation curtailed IPS power to remedy its own violations. (IPS. Br. 22)

The "Inequitable" Burden—Has it Been Established? Accordingly, the appropriate determination as to whether the District Court's remedial order places an inequitable burden on black students must be judged by the particular facts of the case, both intradistrict and interdistrict, including the number of students and the distance each is bused, the proximity of schools to white and black population, which school are obsolete and may be closed. This is the substance of the authorities cited by IPS, but IPS has never presented evidence on these matters. In fact, its own preferred plan (Plan C) would have generally bused black students from their own districts nine years out of twelve, but would have bused white students from their own districts only three years out of twelve.

Further, until the intradistrict plan currently under implementation and any subsequent interdistrict plan have been fleshed out with students and distances, and the other relevant facts, any conclusions on burden cannot be finally determined.

Among other things, IPS disregards the fact that all the suburban school corporations, except Speedway, do not operate neighborhood schools but drive-in schools with percentages of bused students as high as 91.45% (Dis. Crt. Op. April 24, 1979, J.A. 115-116) and that there was evidence that an influx of additional students would cause an alteration in the assignments of existing students (1979 Tr. 1857, 2089).

Does IPS Have Standing on This Question? Further, one questions the standing of IPS to raise this claim. The injured parties are the black students who are represented by the plaintiffs—The United States, and by the Intervenors, Respondents Buckley, both of whom support the remedial order of the District Court (U.S. Br. 17-18, n. 18; Int. Br. 9-11).

The Validity of the Scope of the Remedy under Keyes. Finally, insofar as an interdistrict violation is based on the 1969 Indiana legislation, Lawrence Petitioners do not understand how its scope could extend county-wide, (as urged by IPS' Cross Petition) justifying an implementing court order under the doctrine of *Keyes v. School District No. 1 Denver, Colorado,* 413 U.S. 189 at 203, 213 (1973). The *de jure* segregative acts of IPS occurred prior to 1970 and wholly within its then-existing boundaries. Any portion added to IPS after 1970 would constitute all or parts of Lawrence Petitioners' districts which have always been operated as identifiable areas separate from IPS where transfers of students between IPS and Lawrence Petitioners were made for limited purposes without racial effect.[6]

Accordingly, there could have been no "reciprocal" effect as between the enrollment in the suburban areas and the enrollment in IPS making some schools more black and others more white.[7]

Columbus Board of Education v. Penick, 443 U.S. 449 (1979), is not contrary as urged by IPS in its Opposition Brief (p. 21). Counsel finds no discussion in that case that the annexed areas were involved or a contention, as suggested by IPS, that they were operated in Columbus as "separate identifiable" areas. Even had these contentions been made, they would have been inappropriate since *de jure* activities of the Columbus Board were systemwide until 1974. *See,* 443 U.S. at 461-463.

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6. IPS at the 1979 hearing introduced evidence of all interdistrict transfers between IPS and other Marion County school corporations from the 1940's. It did not urge, and the District Court did not find, they had a racial effect. IPS took no appeal from the failure to make any such finding.

7. Further, the District Court found that the racial differences between IPS and the surrounding school corporations were not caused by the IPS *de jure* segregation (J.A. 110-133), a finding upheld by the Court of Appeals (J.A. 16-18).

Conclusion. Lawrence Petitioners have urged there is no justification for a remedy involving their school corporations. This question aside, there is no justification for IPS' suggested remedy designed to impair or destroy their existence.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illonois 60604
August 7, 1979.

Before

Hon. Thomas E. Fairchild, Chief Judge
Hon. Luther M. Swygert, Circuit Judge
Hon. Harlington Wood, Jr., Circuit Judge

United States of America, *Plaintiff-Appellee,* Donny Brurell Buckley and Alycia Marquese Buckley, etc., et al., *Intervening Plaintiffs,* Nos. 78-1800, 78-1871 *vs.* 78-1996 through 78-2006, 78-2039 and 79-1831 through 79-1838 The Board of School Commissioners of the City of Indianapolis, Indiana, et al., *Defendants-Appellants, Cross-Appellees,* The Metropolitan School District of Perry Township, Marion County, Indiana, et al., *Added Defendants-Appellants.*	Appeals from the United States District Court for the Southern District of Indiana, Indianapolis Division. No. IP 68-C-225. Judge S. Hugh Dillin

IT IS ORDERED by this court, sua sponte, that these appeals are hereby CONSOLIDATED.

IT IS FURTHER ORDERED that the "MOTION OF APPELLANTS BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, ET AL., FOR CONTINUATION OF TEMPORARY RETENTION OF RECORD IN DISTRICT COURT PURSUANT TO Fed.

R.App.P. 11(c)'' filed on July 30, 1979, is hereby GRANTED. Any party who needs any portion of the record not lodged in this court's clerk's office for purposes of argument on appeal can copy that portion, certify its correctness by certification of an attorney, and refer to that document as part of the record on appeal for present purposes.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
August 23, 1979

Before

Hon. Thoms E. Fairchild, Chief Judge
Hon. Luther M. Swygert, Circuit Judge
Hon. Philip W. Tone, Circuit Judge

United States of America,
Plaintiff-Appellee,

Donny Brurell Buckley and Alyca Marquese Buckley, etc., et al.,
Intervening Plantiffs,

Nos. 78-1800, 78-1871, 78-1996 through 78-2006, 78-2039, 78-2221, 78-1831 through 79-1838, 79-1874, and 79-1875

vs.

The Board of School Commissioners of the City of Indianapolis, Indiana, et al.,
Defendants-Appellants,

Otis R. Bowen, as Governor of the State of Indiana, et al.,
Added Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. IP 68-C-1225.
S. Hugh Dillin, Judge

This matter comes before the Court on the filing of "MOTION OF BOARD OF SCHOOL COMMISSIONERS (IPS) FOR AMENDMENT OR CLARRIFICATION OF ORDER OF AUGUST 8, 1979, RELATING TO BRIEFING SCHEDULE" on August 17, 1979. No objection to the motion has been filed.

Sua sponte, this Court orders that 78-2221 is consilidated with the other pending cases in this consolidated appeal.

IT IS ALSO ORDERED that the briefing schedule ordered on August 8, 1979 is hereby amended to read as follows:

1. Appellants challenging the district court judgments on the basis of the court's findings on existence of interdistrict constitutional violations shall file their opening briefs on or before Friday, September 14, 1979. Appellants shall file a joint brief on all issues where their positions on the violation issues are the same. Appellants in Nos. 78-1871 and 78-2006 shall file brief with respect to the district court order of June 2, 1978 on or before September 14, 1979. (Added defendants suburban school corporations, state officials and HACI would file by September 14 their appellants' brief or briefs in Nos. 78-1996 through 78-2005, No. 78-2039, Nos. 79-1831 through 79-1838 and 79-1874 with respect to the judgments of July 11, 1978 and July 9, 1979. The United States and the state defendants would file their briefs on the intradistrict remedy issues at this time.)

2. Cross-appellants challenging the district court judgments on the basis of the court's findings on scope and effect of the constitutional violations and the appropriate remedy required to redress the cumulative effects of the violations, and all appellees with respect to all or any part of the judgments appealed, shall fie their briefs as appellees and/or cross-appellents, on or before Friday, October 5, 1979. Appellees shall confer with one another to avoid duplication of argument. (IPS would file by October 5 its brief as appellee in Nos. 78-1996 through 78-2004 and 78-2039 on the violation issues and as cross-appellant on the scope effects and remedy issues in Nos. 78-2005 and 79-1875. IPS would include a supplemental statement as to its present position in No. 78-1800, updating its opening brief filed July 29, 1978. Intervening plaintiffs and any other parties desiring to support any of the Court's judgments in the consolidated appeals, in whole or in part, would also file brief at the time.)

3. Any reply brief of appellants relating to the violation issues or arguments presented in their opening briefs, shall be combined with their briefs as cross-appellees on the scope-effects and remedy issues and shall be filed and delivered to opposing counsel on or before Friday, Ocober

19, 1979. (Reply briefs of the suburban school districts and state officials, as appellants in Nos. 78-1996 through 78-2004, 79-1831 through 79-1838 and 79-1874, and as cross-appellees in Nos. 78-2005 and 79-1875, would be filed October. 19. Any brief of intervening plaintiffs as cross-appellees in Nos. 78-2005 and 79-1875 would also be due at this time.)

4. Any reply brief of cross-appellants as to the scope-effects and remedy issues in Nos. 78-2005 and 79-1875, together with any reply brief of appellants in Nos. 78-1800, 78-1871 and 78-2006 as to intradistrict remedy issues, shall be filed and delivered to opposing counsel on or before Wednesday, October 24, 1979.

UNITED STATES DISTRICT COURT
Southern District of Indiana
Indianapolis Division

(* * Caption—No. IP 68-C-225 * *)

EXCERPTS FROM ENTRY OF JUNE 2, 1978
S. Hugh Dillin, *Judge*

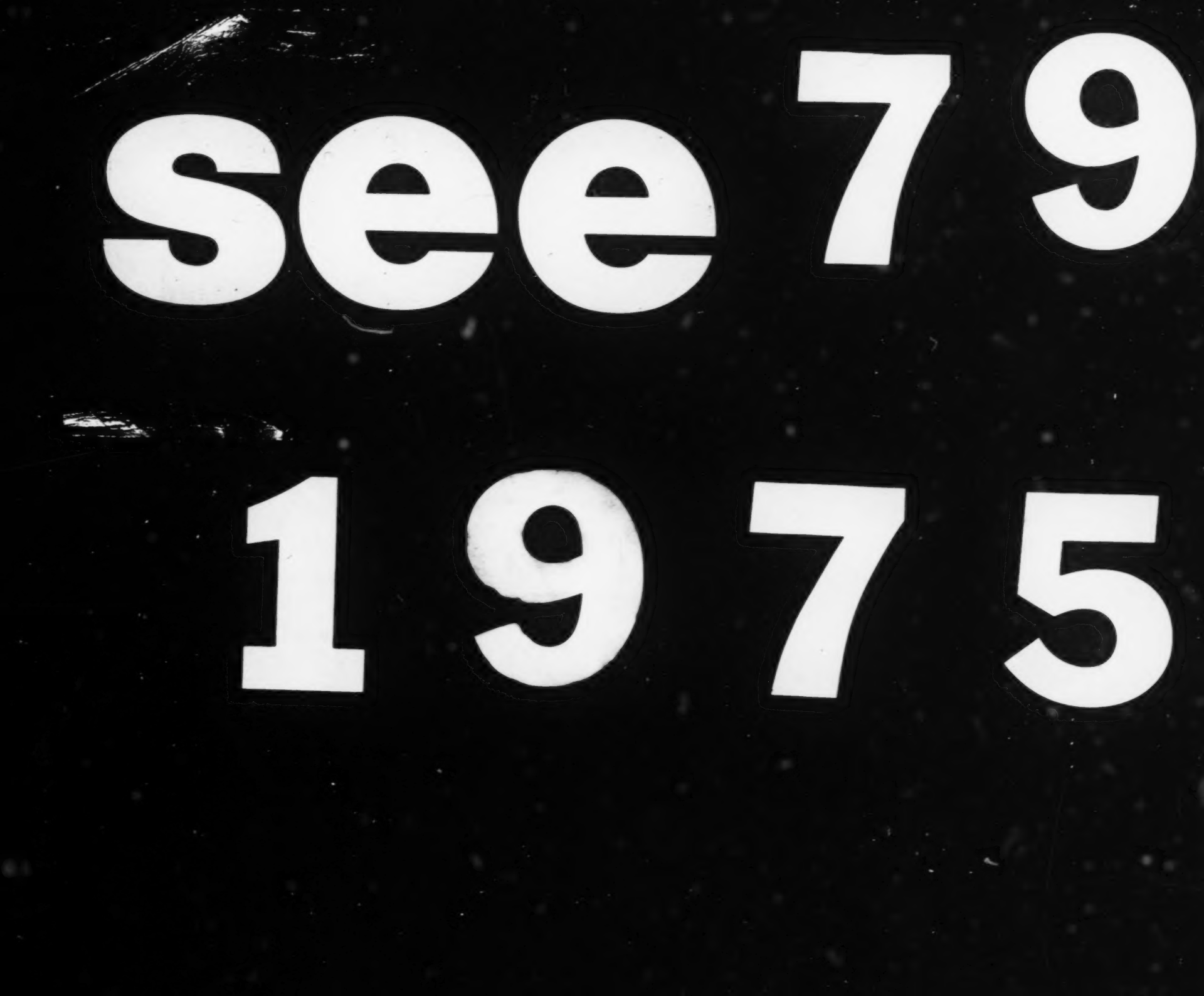
This case comes before the court once again, this time on the order of the Court of Appeals directing this court to give further consideration to its order of April 7, 1978 denying approval of a skeleton desegregation plan proposed by the defendant Board of School Commissioners of the City of Indianapolis (IPS), and intended by it to be implemented for the 1978-79 school year. The plan is referred to by the Court of Appeals as the Proposed Intradistrict Plan, and will hereafter be so styled herein by its initials (PIP).

The Court of Appeals has posed certain questions to this court, which will be answered *seriatim*. However, it also requests that a determination as to the merits of PIP be made independently of the matter of an interdistrict remedy. With all due respect, this court is simply unable to consider one without the other for the very simple reason that the Court of Appeals has already adopted this court's previous findings, based on the evidence, that an interdistrict remedy is the only practical way to desegregate IPS with any prospect of long term success. A recent pronouncement of the Court of Appeals adopting this finding as the law of the case, and criticizing the United States for doing the very thing it is doing in this rather precipitous appeal is as follows:

> "The Government contends that the mandatory transfer of students between IPS and the suburban schools ordered by the district court is improper. After conceding the import of *Milliken*, the propriety of interdistrict relief, and noting the specific finding of facts found by the district court to have substantially caused segregation in the other districts, the Government concludes the district court's order was an abuse of discretion. We are confused by the Government's reasoning.

"We fail to see how the district court abused its discretion when it was clearly acting within the guidelines of *Milliken*. It was not an abuse of discretion merely because the Government would have preferred another remedy.

"Furthermore, the Government's arguments are inconsistent. On the one hand, it demands that segregation be eliminated root and branch from within IPS; on the other, it condemns the only relief which can make its demand a reality. We are surprised the Government seriously offers voluntary transfer as an alternative to mandatory transfer as a means to effectuate its goal of complete desegregation. History has taught us that 'freedom of choice' plans produce negligible results. *Green v. County School Board,* 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1967)." *United States v. Board,* 541 F.2d 1211, 1223.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